Corporate criminal liability and the EC/EU

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SECTION 3 - CORPORATE CRIMINAL LIABILITY AND THE EC/EU: BRIDGING SOVEREIGNTY PARADIGMS FOR THE SAKE OF AN AREA OF JUSTICE, FREEDOM AND SECURITY*

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INTRODUCTION

Neither the EC nor the EU require that the Member States introduce corporate criminal liability as such where this is not already the case. Against this background, Community institutions - especially the European Commission - pay growing attention to this topic in several ways. This chapter first tries to situate corporate crime in the global context of international law and legal history (1.) and to delineate the somewhat blurred academic discussion regarding the European dimension of corporate criminal liability (2.). The chapter subsequently outlines the extent to which the EC/EU deals with the sensitive concept of corporate crime in secondary legislation. Corporate criminal liability at EC/EU level is influenced by the complex interaction between the Community integration path (first pillar), and the more intergovernmental EU police and judicial cooperation in criminal matters (third pillar) (3.). Beyond institutional complexity, the issue of a comprehensive framework regarding

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corporate criminal liability within the Union ought to be raised. A special focus is given to future conceivable developments following the Lisbon Treaty (4.). This last institutional reform aims to extend the Community method - with a few exceptions - to the entire field of Justice and Home Affairs (JHA), thereby integrating the current third pillar into the 'Union', endowed with a single legal personality.

1. CORPORATE CRIMINAL LIABILITY IN AN HISTORICAL CONTEXT

Corporate criminal liability is quite an old concept. Strikingly enough, the criminalisation of 'bodies deprived of soul' (*entités dépourvues d'âme*) has been controversial since its very beginning and across legal history (1.1.). As already seen in the first research results of this book, corporate criminal liability fuels many debates among European States as well as at academic and policy-making levels (1.2.). For a few decades now it has attracted growing attention in international and European legal discussions (1.3.).

1.1. THE INITIAL CONTROVERSY IN LEGAL HISTORY

The Romans were basically opposed to the idea that a *persona* may be something else than a natural one. This was mainly the result of antique philosophy, which taught that *universi consentire non possunt.*[1] For a long time, Roman law ignored corporate criminal liability. Gradually however, Romans cautiously admitted that a collective entity might have legal personality distinct from its members. This conceptual evolution was apparently sufficient to acknowledge that a legal person, even fictitious, could commit an offence and, in some cases, be punished in criminal law.[2] The fact remains that some of the most illustrious commentators of Roman law maintained the classical idea that *universitas* could not be criminally punished during this period. As non-physical entities, they might not do something contrary to public morality.[3] This eventually led to the famous adage, *societas non delinquere potest, nec puniri.*

During the Middle Ages, a kind of criminal liability of corporate bodies existed in several kingdoms and counties in Europe. The French *Grande*

1 R VALEUR, *La responsabilité pénale des personnes morales dans les droits français et anglo-américains* (Paris, Giard, 1931) 9.

2 *Ibid.*

3 FC VON SAVIGNY, *Traité de droit romain*, T.II (Paris, 1855) para 87-102, quoted by A MESTRE, *Les personnes morales et le problème de leur responsabilité pénale* (Paris, Rousseau, 1899) 9.

Ordonnance Criminelle (1670), typical of the *Ancien Régime*, mentioned the subject in great detail.[4] Similarly, ecclesiastic courts could enact a decree of excommunication upon monasteries, which was one of the toughest criminal penalties under Canon law.[5] Since on the whole, Europe was catholic at that time, a kind of 'corporate' criminal liability - or, better, a criminal liability of collective entities - was therefore widely recognized by the highest religious authorities.[6] It is interesting to note that sanctioning a non-physical entity remained much controversial, even during this period. In the thirteenth century, Pope Innocent IV decided to forbid ecclesiastic courts to excommunicate collective bodies on the theological ground that the latter did not possess any soul. This echoes the former conviction of the Romans that a legal person is unable to cause harm either to public morality or - in the Middle Ages - to the *law of God.* To some extent, this criticism announced the contemporary arguments of certain criminologists or criminal-law specialists who doubt that a company that undergoes a criminal penalty is able to feel remorse and to be deterred from committing new offences whereas it is deprived of any *mens rea.* In practice however, this ban was mainly motivated by the fact that the excommunication of monasteries would diminish the Church's control over certain ecclesiastical properties.[7]

As a result of the French Revolution, libertarian beliefs and the principle of the *personnalité des peines* dominated the debate on criminal law reforms for a while. Consequently, Europe came back to the idea that corporations may not be held liable in criminal law.[8] This was fully in line with the ban on guilds enacted by the *Le Chapelier* decree of 14-17 June 1791. As far as people were not allowed to set up associations, it would have been contradictory to introduce or maintain a regime of corporate criminal liability. This tendency was consolidated by French courts until the reform of the Penal Code in 1992. Admittedly, several *leges speciales* in France organized corporate criminal liability in a limited number of sectors. Notwithstanding this, the French *Cour de cassation* consistently refused to identify a general principle of criminal law in this respect, interpreting

4 G STESSENS, 'Corporate Criminal Liability: a Comparative Perspective', 43 *Int. & Comp. L. Q.* [1994] 494.

5 G GEIS and JFC DIMENTO, 'Empirical evidence and the Legal Doctrine of Corporate Criminal Liability', 29 *Am. J. Crim. L.* [2002] 347.

6 K TIEDEMANN, 'Rapport introductif', in: M DELMAS-MARTY (dir.), *La responsabilité pénale dans l'entreprise, vers un espace judiciaire européen unifié ?* (Paris, Dalloz, 1997) 268.

7 G GEIS and JFC DIMENTO, above at fn 5, 347 and 348.

8 K TIEDEMANN, above at fn 6, 268.

these laws as exceptions to the general principle according to whieh legal persons might only he held responsible under civil or administrative law.[9] Being a legal fiction, corporations could fulfil neither the *actus reus* nor the *mens rea* rcquirements.[10]

The former Soviet Republics and Soviet satellite statcs for their part were influcnced by the classical school of criminal law. Aceording to this line of reasoning, corporate bodies' criminal liability was deemed to distort the fundamentals of criminal law.[11] Under the 1958 Pcnal Code of the Soviet Union, a person might in principle be held responsible in criminal law: (1) if hc/she was conscious of the socially dangerous character of his/her omission or act; (2) if he/she foresaw the socially dangerous consequences of his/her offence, and; (3) on condition that he/she desired those consequences or consciously endorsed them. Such eonditions were hardly applicable to non-physieal entities. Morcover, criminal repression was rcgarded in communist states as having an auxiliary role in protecting the socialist legal order.[12] Corporate law was underdeveloped in the Soviet Union since almost all undertakings were owned by the State. The managcrs barcly enjoyed any autonomous decision-making power.[13] Understandably, the State did not feel it necessary to set up a criminal-law system whereby its 'own' decisions could give rise to criminal liability. The Sovict Union, in other words, could not eause harm to the socialist legal order.

By contrast, thc early industrial revolution in Anglo-Saxon countries, accompanied by a proliferation of corporatc bodies, rcvivcd the controversy.[14] In the United States, in the famous Case *New York Central*

9 See e.g. Cass (fr.), *Administration des Contributions Indirectes c. Butruille, Gaz. Pal.* [1929] 395.

10 G STESSENS, above at fn 4, 495.

11 V RIMKUS, 'Responsibility of Legal Persons for Corruption in Lithuania', in: *Expert Seminar for Eastern Europe and Central Asia. Criminalisation of corruption*, 26-28 March 2007 (Almaty, Kazakhstan) 32, available at: <www.oeed.org/dataoecd/56/29/38873929.pdf>.

12 AN TARBAGAEV, *Introduction in Russian Criminal Law*, vol. I (Krasnoyarsk, Krasnoyarsk State University, 1996) 28. See also W BUTLER, *Soviet Law* (London, Butterworths, 1983) 262.

13 S LUCAS and Y MALTSEV, 'The development of corporate law in the former Soviet Republics', *Int. & Comp. L. Q.* [1996] 365 and 366.

14 M WAGNER, 'Corporate Criminal Liability. National and International Responses', Paper presented at the Thirteenth International Conference of the International Society for the Reform of Criminal law on Commercial and Financial Fraud, Malta, 8-12 July 1999, available at :

& Hudson River,[15] thc Supreme Court reversed the standpoint that companies may not be criminally scntenced even for intentional crimes. Although English courts originally rejected the very idea of corporate liability, they gradually moved away from this position.[16] Nowadays, the United Kingdom has a long-standing tradition of 'modern' corporate criminal liability.[17] This evolution soon influenced other national legal orders in Europe, such as Denmark, a country that has had a regime of corporate criminal liability sincc the first half of the Twentieth Century.

1.2. DIVERSITY IN EUROPE AND THE WORLD

The national contributions to the present book illustrate a contemporary tendency in favour of corporatc criminal liability in Europe. This contrasts increasingly with the former continental reluctance. A quick look at the international literature regarding corporate criminal liability however indicates that this concept, although quite old, remains much debated.

A fundamental question concerns the *opportunity* of prosecuting legal entities which, after all, have *'no soul to damn, and no body to kick'*.[18] Arguments have to be shared as to the advantages and shortcomings of (partially) abandoning civil or administrative sanctions in favour of criminal ones and, if this is the case, to which extent and under which conditions. This article docs not intcnd to tackle this issue, although it is closcly related to thc way a legal system perceives crime, the repression of crime and thc prevention of future criminal acts or behaviours. Criminal penalties seem to be the toughest answer to an illegal behaviour. It should therefore be used with parsimony, especially in cases where it is not easy to identify the culpability criteria.[19] Likewise, any new criminalisation of a legal pcrson's activities should be precedcd by a well founded academic

<www.icclr.law.ubc.ca/Publications/Reports/CorporateCriminal.pdf>.

15 Supreme Court, *New York Central & Hudson River R.R. Co. v. United States* 212 U.S. 481 (1909).

16 G STESSENS, above at fn 4, 495.

17 A PINTO and M EVANS, *Corporate Criminal Liability* (London, Sweet & Maxwell, 2003) 3.

18 JC COFFEE, 'No Soul to Damn: No Body to Kick : An Unscandalised Inquiry into the Problem of Corporate Punishment', 79 *Mich. L. Rev.* [1981] 386.

19 V MITSILEGAS, *Money Laundering Counter-Measures in the European Union. A New Paradigm of Security Governance Versus Fundamental Legal Principles* (The Hague/London/New-York, Kluwer law International, 2003) 123 to 125.

and political debate or, in Nuotio's words, by 'slow food' rather than a 'dry' harmonisation of sanctions.[20]

As we argued elsewhere,[21] such a controversial discussion at EU level demands deep comparative studies, meetings between national political and judicial bodies, the prolonged and deepening of the remarkable research initiative that led to the *corpus iuris*.[22] Sub-regional comparative studies, such as the recent workshop on corporate criminal liability in Nordic and Baltic countries organized by the Latvian Ministry of Justice, may only deepen mutual knowledge and, in the longer run, hopefully facilitate the exchange of best practices.[23]

Hence there are still countries that do not (fully) admit corporate criminal liability. This is the case of Germany for example, where an elaborate system of administrative sanctions was developed, especially on grounds of the *Ordnungswidrigkeitengesetz*.[24] What is more noticeable is that punishing legal persons is increasingly criticised in states where it was recently introduced, such as Belgium[25] or Italy,[26] or even in countries usually considered leaders in this field, especially the United States.

20 K NUOTIO, 'Harmonization of criminal sanctions in the European Union - Criminal science fiction', in: EJ HUSABØ and A STRANDBAKKEN (eds), *Harmonization of Criminal Law in Europe* (Antwerpen/Oxford, Intersentia, 2005) 101.

21 S ADAM, 'La responsabilité pénale des personnes morales à la lumière du droit international: vers une consécration des potentialités constitutionnelles du troisième pilier?', 2 *Chron. dr. publ.* [2006] 299 ; S ADAM, 'Le droit européen et la responsabilité pénale des personnes morales', 7 *Journ. trib. dr. eur.* [2006] 204.

22 M DELMAS-MARTY, above at fn 6. See also M DELMAS-MARTY and JAE VERVAELE (eds), *La mise en œuvre du corpus iuris dans les Etats membres* (Antwerpen/Groningen/Oxford, Intersentia, 2000).

23 D RONE, *Legal Scientific Research on Institute of Criminal Liability of Legal Entities in Eight Countries – Nordic Countries (Finland, Sweden, Norway, Iceland and Denmark) and Baltic countries (Latvia, Lithuania and Estonia)*, workshop held in Riga on 15 March 2006. We are thankful to the Latvian Ministry of Justice for having communicated us this document.

24 See e.g. on Germany W HETZER, 'Corruption as Business Praetice ? Corporate Criminal Liability in the European Union', *Eur. Journ. of Crime, Cr. L. and Crim. Just.* [2007] 383-405. See also the chapter written by Dieter DÖLLING and Christian LAUE in this book.

25 See apart from the contribution of Antoine MISONNE in present book, J OVERATH, M GERON, C GHEUR and T MATRAY, *La responsabilité pénale des personnes morales* (Bruxelles, Larcier, 2007) esp. 73-97; M NIHOUL (dir.), *La responsabilité pénale des personnes morales en Belgique* (Bruges, La Charte, 2005); J MESSINE, 'La responsabilité pénale des personnes morales en droit belge au regard de la protection des intérêts financiers des Communautés européennes', in: G DE KERCHOVE and A

On both sides of the Atlantic Ocean, a main point of discussion relates to the identification of a true 'corporate delinquency' deserving collective punishment.[27] This convergent transatlantic criticism makes it difficult to follow authors such as Beale and Safwat, who somehow try to identify a 'sharp contrast' between the US - where corporate criminal liability is indeed old but attracts growing criticism - and many European countries that recently introduced criminal liability for corporations, where the latter would allegedly not raise any discussion.[28]

Arguably, much diversity still exists among European States. This holds true for the Member States of the EU, some of which simply maintain that *societas non delinquere potest* or that *societas deliquere potest sed non puniri*.[29] Considerable divergences can also be seen however, between those jurisdictions where a corporation may be held responsible in criminal law.[30] These differences concern the circumstances giving rise to such liability, the categories of offences for which corporate bodies may be held liable or the possibility to start parallel proceedings against natural persons, just to name a few. The types of sanction, their amount and the circumstances leading to their softening may also vary considerably between the Member States.

1.3. REKINDLING OF THE CONTROVERSY: INTERNATIONALISATION OF CORPORATE CRIME

This is not to say that such disparities are fully satisfactory, especially when one considers the evolution of criminality during the last decades.

WEYEMBERGH (éd./eds), *Vers un espace judiciaire pénal européen. Towards a European Judicial Criminal Area* (Bruxelles, Ed. ULB, 2000) 277-291.

26 See apart from the chapter she wrote in this book G MANNOZZI, 'La responsabilité des personnes morales et des chefs d'entreprise', in: F RUGGIERI (dir.), *Symposium d'étude. La protection des intérêts financiers de l'Union et le rôle de l'OLAF vis-à-vis de la responsabilité pénale des personnes morales et des chefs d'entreprises et admissibilité mutuelle des preuves* (Bruxelles, Bruylant, 2005) 23-37.

27 See for a comparative analysis between European and American systems, R HEFENDEHL, 'Corporate Criminal Liability : Model Penal Code Section 2.07 and the Development in Western Legal Systems', 4 *Buff. Crim. L. Rev.* [2000] 283-300.

28 S BEALE and A SAFWAT, 'What Developments in Western Europe Tell Us about Ameriean Critiques of Corporate Criminal Liability ?', 8 *Buff. Crim. L. Rev* [2005] 90.

29 Examples thereof are Luxembourg, Austria and, to some extent, Germany and Sweden.

30 This concerns now a wide majority of EU Member States.

First and foremost, differences as to the type and level of punishment might reinforce the feeling of impunity of offenders, encouraging them to concentrate their illegal activities on certain areas or to take advantage of various legal systems. Besides this, the risk should not be excluded that differences complicate judicial cooperation between authorities resorting to different legal orders, especially when the offence is only punishable in the requesting State. A similar reasoning holds true with regard to the mutual recognition of criminal judgments.[31] It might equally be perilous to fully implement a criminal punishment affecting a foreign company when the latter is established abroad or has the main part of its assets in another Member State than that where the punishment was decided.

Against this background, the internationalisation of corporate crime, due to businesses ever more active beyond national borders, called for a reaction from the international community (a.). The ambit and the scope of these international responses nonetheless remain limited (b.).

a. An international response to cross-border corporate crime

No contemporary debate on corporate criminal liability is possible without tackling its international dimension. As early as 1929, the second conference of the *Association internationale de droit pénal* held in Bucharest concluded that it would be desirable that national criminal measures be adopted against legal persons whenever an offence is committed for their benefit or with their resources.[32] This tendency was confirmed at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders (1985), whose conclusions were approved by the UN General Assembly.[33] As Professor Wells accurately points out:

> 'Globalisation, leading to pressures for convergence and harmonisation of laws, constitutes an important factor influencing the modern debate about corporate accountability. Concerns about the reach and power of global corporations, their involvement in fraud, economic crimes, corruption, health and safety breaches and environmental depredations are

31 See D VANDERMEERSCH, 'La dimension internationale', in: NIHOUL (dir.), above at fn 25, 259 to 261.

32 *R.I.D.P.* [1930] 10.

33 A/RES/40/32, 29 November 1985.

> reflected in the recent appearance of criminal liability on national and international law reform agendas.'[34]

Several such corruption scandals emerged in the Nineteen-seventies.[35] Confronted with growing cross-border corporate crime, such as bribery of national public officials, the international community realized that a minimum harmonisation of the sanctioning regimes towards corporate bodies was necessary to avoid international *forum shopping*. Consequently, several international treaties were concluded with the aim of combating corruption. Those instruments usually established common (minimum) requirements regarding the liability of legal persons for serious offences.[36]

Subsequently, harmonisation of corporate liability also slowly developed in other fields such as environmental protection,[37] cybercrime[38] or organised crime.[39] The international standards often prescribe, beyond minimal harmonisation, mutual legal assistance between States parties when investigating or prosecuting offences for which legal persons may be held responsible.[40]

The Council of Europe (CoE) played an important role in the internationalisation of corporate criminal liability.[41] The Committee of Ministers of the Council of Europe was historically the first international organisation to encourage the adoption by States of mechanisms, to hold

34 C WELLS, 'International Trade in Models of Corporate Liability', in: X, *Verso Codice Penale Modello Per l'Europa la Parte Generale* (Parma, University of Parma, 2000) 1.

35 G AIOLFI and M PIETH, 'International aspects of corporate liability and corruption', in: S TULLY (ed.), *Research Handbook on Corporate Legal Responsibility* (Cheltenham/Northampton, Elgar, 2005) 396-398.

36 See UN Convention against corruption (2003), Article 26; OAS Inter-American Convention against Corruption (1996), Article VIII; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 2, 3 §2; CoE Criminal Law Convention on Corruption (1999), Article 18, 19 §2; EU Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests (1997), *OJ* C 221/12, 19 July 1997, Article 3.

37 See e.g. CoE Convention on the Protection of the Environment through Criminal Law (1998), Article 9.

38 See e.g. CoE Convention on cybercrime (2001), Article 12.

39 See e.g. UN Convention against transnational organized crime (2000), Article 10.

40 See e.g. UN Convention against corruption (2003), Article 46; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 9.

41 See for a deep analysis the paper of Guy DE VEL in this book.

legal persons criminally liable for certain types of offence.[42] Recommendation R(81)12 essentially emphasised the considerable growth of economic activity in the Council of Europe and the fact that it was accompanied by an increase in economic criminal offences causing losses to partners, shareholders, employees, competitors, customers, creditors and even to public authorities all over Europe. This first recommendation however, did not require the adoption of corporate criminal liability as such. It simply encouraged Member States to, *'examine [this] possibility [...] or at least [introduce] other arrangements serving the same purposes in respect of economic offences'*.[43]

More specifically, the Committee of Ministers paid more specifically attention to corporate criminal liability in Recommendation R(88)18, adopted a few years later. Recalling the international increase in economic crimes committed by legal persons, this second document expresses the desirability of, *'placing the responsibility where the benefit derived from the illegal activity is obtained'*. Considering *'the difficulty, due to the often complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence'*, it therefore recommended the application of criminal liability and sanctions to legal persons.[44] The Committee of Ministers nevertheless remained cautious in this recommendation. At that time, numerous Member States were still opposed to corporate criminal liability. As a consequence, Recommendation R(88) 18 recognizes the possibility to combat economic crime by *'applying other systems of liability and sanctions, for instance those imposed by administrative authorities and subject to judicial control'*.[45]

b. The limited scope of the international response

These efforts to bring the discussion on corporate crime at the international level are limited. As a rule, they never require the introduction of criminal penalties against legal persons as such. Moreover, they focus on quite specific areas and are usually compensated by full respect for the domestic legal systems fundamental principles. Last but not least, even when these

[42] Recommendation R(81)12 on economic crime, 25 June 1981 and Recommendation R(88)18 concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, 20 October 1988.

[43] Recommendation R(81)12 at point II.2, fourth indent.

[44] Recommendation R(88)18 at point I.1 *jct°* I.3.a.

[45] *Idem* at point I.3.b.

conventions have been ratified, their implementation often lacks effective enforcement mechanisms, other than to a limited extent within the CoE and the EU. This cautious approach can be explained by two cumulative factors: first, criminal policies and criminal justice - as with security and defence - are at the core of state sovereignty; second, corporate liability remains a much disputed subject matter in almost all legal systems.

In this context, it should be pointed out that the above outlined internationalisation of corporate criminal liability currently does not concern the international repression of war crimes, crimes against humanity and genocide. Whereas some States try to make it possible for legal entities to be held responsible in criminal law for such serious offences, no consensus could be reached to give such competence to international courts dealing with international crimes.[46]

This is the case of the International Criminal Court (ICC) for example. Despite the proposal made in this sense by the Preparatory Committee,[47] the Rome Statute does not allow the conviction of a private company.[48] Eventually it proved impossible to reach an agreement on this point between States with such divergent legal traditions regarding the fight against corporate crime. Some States feared in particular that trials against legal persons would mostly affect those persons that are not responsible for the crimes under discussion, in particular the population or new governments. By the same token, the opponents underlined the difficulty of choosing suitable sanctions for corporate bodies.[49] Other States parties feared that creating responsibility for legal persons would undermine

[46] See J WOUTERS and L DE SMET, 'De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van het internationaal humanitair recht in het licht van de Belgische Genocidewet', KU Leuven, Instituut voor internationaal Recht - Working Paper nr. 39, januari 2003 at 5-10, available at: <http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WP39n.pdf>.

[47] Draft Statute for the International Criminal Court, A/CONF.183.2/Add.1, 14 April 1998, esp. at 49 and 121.

[48] Article 25, 1° of the Rome Statute (ICC). See however the interpretation of Article 25, 3° d of the ICC Statute proposed by GJ KNOOPS in his contribution to the present book.

[49] For a summary of the arguments of the States that were opposed to the Preparatory Commitee's proposal, see the explanations given by the Norwegian Minsitry for Foreign Affairs in a written answer to the Norwegian Parliament's questions related to the ratification of the Rome Statute, 6 January 2000, available at <www.coe.int>.

individual responsibility.[50] The same exclusion holds true for the international tribunals for the former Yugoslavia (ICTY)[51] and for Rwanda (ICTR).[52]

2. CORPORATE CRIMINAL LIABILITY AND EUROPEAN LAW

It is at first glance not an easy task to identify a clear-eut link between corporate criminal liability and the EC/EU. As will be evidenced in a first section however, the tools provided by the EC/EU were necessary in order to improve the fight against certain forms of cross-border crime, especially in the context of an area of justiee, freedom and security (2.1.). In the meantime, any intervention of the EC/EU in this field requires a feasibility study (2.2.). One should also keep in mind certain principles enshrined in the Treaties' practice, which can be of importanee for eorporate liability at EC/EU level (2.3.).

2.1. THE EUROPEAN DIMENSION OF CORPORATE LIABILITY

a. Growing cross-border eorporate erime

Recently, Member States of the European Union have been confronted with an increase in cross-border corporate crime. The abolition of the borders within the Union and the disappearanee of border controls, along with an increasing mobility resulting from the free movement of persons, has facilitated cross-border crime. The faet that the law enforeement authorities are in principle only competent within the boundaries of one Member State turns out to be an ineentive for cross-border crime, the wrongdoers getting involved in a 'forum shopping' between the various criminal justice systems among the EU.

In parallel, Community integration had a considerable influence on corporations and hence on European corporate erime. This evolution not only resulted in opening up markets and the recognition of rights to the benefit of companies, directly flowing from primary law or EC seeondary legislation. It also meant the creation of new obligations ranging for example from the ban on discrimination at work or harmonised standards

[50] I CAMERON, 'Jurisdiction and admissibility issues under the ICC Statute', in: D MCGOLDRICK, PJ ROWE and E DONNELLY (eds), *The Permanent International Criminal Court* (Oxford, Hart Publishing, 2004) 71.

[51] Article 6 ITCY Statute.

[52] Article 5 ICTR Statute.

for the production of certain goods to fair competition practices. Since the very beginning Member States have been reluetant to let the Community decide the means by which the infringements of sueh obligations should be sanctioned, fearing their national sovereignty would erumble away.

b. Protection of European 'Common Goods'

At least with regard to crimes affecting the finaneial interests of the Community, broad support exists for the opinion that a European response would be more effective than an array of sanctioning regimes. This would not only entail common sanctions against natural and legal persons but also, in the longer run, supranational investigations held by a European Prosecutor's office, acting hand in hand with Eurojust and Europol and bringing perpetrators (especially legal persons) and their accomplices before criminal courts. Like Eurojust, the European Prosecutor's office would aet as a counterweight to the growing investigative powers of Europol or the OLAF, the latter being essentially police institutions.[53] An important difficulty arises with regard to the identification of those 'common goods', especially in the light of the wide scope of the Treaties. In our opinion, preservation of the 'common goods' should entail legal persons in order to be effective. Companies are indeed essential actors in the daily life of the EC/EU. They are able to affeet substantially the Community revenues on a global scale, partly resulting from indirect taxation. In the light of globalisation, ever stronger companies could even weaken the Community project as a whole if their illicit behaviours were not adequately sanctioned when not complying with either EC or domestic law.

c. Equal Competitiveness and Legal Certainty

A third point of diseussion is the current unequal treatment of corporations within the different Member States regarding criminal liability and the legal uneertainty thus ereated.

Considering that most legal persons have aetivities and assets in more than one Member State, it could not reasonably be excluded that they relocate in the Member State where the risk of penalty is the lowest or even does not

[53] L SALAZAR, 'La protection des intérêts financiers des Communautés européennes et la lutte eontre la corruption internationale dans l'instauration d'un espace judiciaire pénal européen', in: G DE KERCHOVE and A WEYEMBERGH (eds), *Vers un espace judiciaire pénal européen* (Bruxelles, Ed. de l'U.L.B., 2000) 300.

exist.[54] In an early statement in 1994, Guy Stessens, denouncing a probable 'Delaware effect',[55] already called for a European model of corporate criminal liability.[56] Other authors later defended a comparable point of view.[57] In its Green Paper on criminal sanctions, the Commission similarly argued, although in quite cautious terms, that mutual confidence could imply some harmonisation of criminal penalties against legal persons in order to avoid a competitive disadvantage for those States that hold companies liable under criminal law where others do not.[58]

These calls however were not followed in practice, as it is illustrated by the 2006 Services Directive. This Directive applies both to natural and to legal persons.[59] The scope of a corporate criminal sanction is traditionally limited to the legal order where it has been pronounced. The sanction as such, in the absence of any specific cooperation mechanism, does not extend to other Member States.[60] Considering that it neither harmonises nor

54 European Commission, Green Paper on the approximation, mutual recognition, and enforcement of criminal sanctions in the European Union, COM(2004) 334 final, 30 April 2004, 52. See *contra* K NUOTIO, above at fn 20, 92. This author considers that this approach *'is problematic because criminal activities are very seldom likely to be so strategically planned and to follow such clear cost/profit calculations'*.

55 The "Delaware effect" refers to the potential attraction exercised by this state on companies due to a favourable corporate law. This effect is more and more disputed in legal doctrine. See R DAINES, 'Does Delaware law improve firm value?', 62 *Journ. Fin. Eco.* [2001] 559-571. See also on the effects of harmonising EU company law in order to reach a non-competitive equilibrium, JA MCCAHERY and PM VERMEULEN, 'Does the European Company Prevent the 'Delaware-effect'?', 6 *Eur. L. Journ.* [2005] 785-801.

56 G STESSENS, above at fn 4, 520.

57 See M-Ch PINIOT, 'Rapport de synthèse', in: M DELMAS-MARTY, above at fn 22, 358; L PICOTTI, 'Délits, peines et dédommagements', in: L CAMALDO (dir.), *Les délits financiers dans la legislation européenne : l'OLAF et la réparation du dommage* (Bruxelles, Bruylant, 2006) 127.

58 European Commission Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, above at fn 54, 52. See especially T SPRONKEN and M ATTINGER, 'Proeedural rights in criminal proceedings: existing levels of safeguards in the European Union', internet-paper available at: <http://ec.europa.eu/justice_home/doc_centre/eriminal/rccognition/docs/report_proc_safeguards_en.pdf >.

59 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* L 376/36, 27 December 2006.

60 Such a cooperation mechanism has been established in the field of financial penalties. See Council Framework Decision 2005/214/JHA of 25 February 2005 on the application of the prineiple of mutual recognition to financial penalties, *OJ* L 76/16, 22 March 2005. These provisions are applicable to criminal sentences decided upon legal entities, even if the executing State does not recognize the principle of criminal liability of legal persons (Artiele 9, 3°).

prejudices domestic criminal laws,[61] the Services Directive does not seem to require from the Member Statc where the service is to be provided, to assume all the consequences of criminal sanctions decided abroad, in particular against legal persons. As a result, it leaves this Member State free to neutralize or not, the free movement of the service provider when the sentence affects his professional reliability. Of course, this State could take such sanctions into account in order to refuse access to its market, for example by invoking a threat to the public order or security.[62] Such a refusal is, nonetheless, not compulsory and no specific mechanism guarantees cxecution of the criminal sentence in the country where the service is to be provided.

One could argue that allowing the sentenced legal person to remain active in other Member States is not fully in line with the loyalty principle enshrined in Article 10 EC. The unequivocal exclusion by the Services Directive of any harmonising effect on domestic criminal laws conversely tends to indicate that it might be possible for a company suffering from a temporary ban in a Member State to provide services in another Member State, depending upon the decision of the lattcr. This is all the more so given that the EC does not enjoy genuine competences as such in the field of cooperation in criminal matters, at least until the Lisbon Treaty enters into force.

More gcnerally, the mutual recognition of judicial decisions sanctioning corporations in criminal law remains unclear. The application of the *ne bis in idem* principle is also highly controversial. These aspects are examined below.[63]

2.2. THE FEASIBILITY OF A COMMON SYSTEM OF CORPORATE LIABILITY

The feasibility of a common system of corporate (criminal) liability is strongly connected to the principle of subsidiarity, analysed below, but may bc cven more complicated due to the very different legal traditions in the

61 See Preamble at 12 and Artiele 1, 5°.

62 With regard to last point, the Services Direetive admittedly improves the exchange of information by organising a new procedure. Member States are under an obligation to supply information, at the request of the eompetent authority in another Member State, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent authorities in respect of the provider which are directly relevant to the provider's competence or professional reliability (Article 33, 1°).

63 See below, 3.3. c and *d*.

Member States. States accepting the principle of corporate criminal liability do not share the same view as to the relevant criteria to attribute criminal responsibility to a corporate body. This paragraph does not aim to provide an all-encompassing, comparative overview of the range of dissimilarities in corporate criminal liability models. Two determining issues however deserve special attention, namely the categories of legal persons and crimes covered on the one hand (a.), and the various theories regarding the culpability of a legal person on the other (b.).

a. The scope ratione criminis and ratione personae

The assumption that a high level of disparity exists between internal models of corporate criminal liability holds true, first of all, *ratione criminis*. Whereas some States extend corporate punishment to their entire criminal law,[64] others prefer to limit it to specific sectors where it may have seemed necessary to punish a legal entity rather than or simultaneously with, (a) natural person(s).[65] As will be further explained below, the European institutions so far have limited their requirements regarding the liability of legal persons for specific offences having - alongside a particular seriousness - a cross-border dimension.

Dissimilarities are also obvious *ratione personae*. Western States generally exclude the corporate criminal liability of public bodies, even though this is less the case for local entities and state-owned or state-controlled enterprises.[66] Some Member States like Finland,[67] prefer to apply a functional criterion (was the offence committed in the exercise of public authority?) than an 'organic' one. In the UK, the recently promulgated *Manslaughter and Corporate Homicide Act 2007* makes it possible to declare some departments of State guilty of an offence, provided the way their activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care they owed to the deceased.[68] Moreover, a certain number of States do not restrict criminal liability to collective legal persons but extend it to single-owner

64 See e.g. Belgium.

65 See e.g. Denmark or Italy. This was also the case in France before the 2004 legislative reform.

66 M PIETH, 'The Responsibility of Legal Persons', in: M PIETH, L LOW and PJ CULLEN (eds), *The OECD Convention on Bribery. A Commentary* (Cambridge, Cambridge University Press, 2007) 185 and 186.

67 Ch. 9, sect 1, 2° of the Finnish Penal Code.

68 Article 1, 1° and 2° *b jct°* schedule 1.

businesses.[69] A criminal sanction is sometimes possible against any entity capable of enjoying rights and bearing duties, including groups, partnerships, associations, business entities and even - as in Iceland[70] - foundations, administrative authorities, institutes or municipalities.

b. The attribution of culpability to a corporate body

The way blame may be attributed to a corporation seems even more controversial. Criticism of corporate criminal liability regularly focuses on the difficulty to reconcile the moral element that traditionally underlies criminal punishment as well as the fact that a corporate body may not itself commit an offence. A sensitive question is therefore, what is the link between an act or behaviour of one or more individuals and the attribution of responsibility to a corporate body? This issue, already evoked in the section devoted to the historical background, remains debated in almost all legal systems, either those admitting corporate criminal liability or those that do not.[71] Three different theories may be identified here, although most legal systems do not correspond specifically to one of them.[72]

A first theory, known as the *vicarious liability/respondeat superior*, makes it possible for corporate bodies to incur responsibility for offences committed by their employees - even where they are deprived of any managerial or representative responsibility - for the company's benefit and/or within their activities. Such liability may even be established, in some legal systems, for offences committed by persons working for the corporate body without being the latter's employees legally speaking.[73] Reflecting a civil law logic, vicarious liability is a kind of anthropomorphic system whereby the corporate body takes entire responsibility for its employees' misconduct. Admittedly, this criterion for attributing

69 See e.g. para 26.2 of the Danish Criminal Code.

70 Ch. II a, sect 19 *b* of the Icelandic General Penal Code.

71 For an example of criticism against the strict liability standard applied at federal level in the USA, see J HASNAS, *Rethinking Vicarious Criminal Liability: Corporate Culpability for White-Collar Crime*, Webmemo of the Heritage Foundation (Washington), n. 1195 [15 August 2006], available at: <www.heritage.org/research/legalissues/wm1195.cfm>.

72 C WELLS, 'Corporate criminal responsibility', in: S TULLY (ed.), above at fn 35, 150 to 153.

73 See in this respect para 27.1 of the Danish Criminal Code, which extends the attribution of responsibility to the offences committed by each natural person *connected to* the legal person.

responsibility to a legal person goes far beyond current requirements of international law.[74]

A second model for attributing criminal liability to a legal person is the *alter ego/identification* theory. Here, only managers or employees endowed with certain responsibilities within the company may cause corporate criminal liability, especially for offences requiring *mens rea* (criminal intent). Key personnel act as the company itself rather than on behalf of it. This makes it conceptually possible to sentence corporations for offences requiring a mental element of intention, recklessness or negligence.[75]

Some argue that these anthropomorphic models have been unable to reflect the complexity of decision-making processes within modern companies, especially multinationals. Their implementation eventually, *'mask(ed) the reality that some acts may flow from group norms and policy and may be difficult to attribute to any particular individual within the group'*.[76] The failure of the identification theory to *'reflect corporate blameworthiness'*, in Fisse's and Braithwaite's words,[77] called for an *aggregation model* that would focus on the combined and cumulative behaviour that ultimately lead to the offence. The task of the prosecutors is to identify a 'corporate culture' that made possible, encouraged or tolerated the offence. The investigations should also clarify whether the company failed to take sufficient organisational measures to avoid the offence. Useful illustrations of this 'holistic' approach are to be found in Australia[78] and, even more recently, in Switzerland.[79]

2.3. EC/EU PRINCIPLES ON CORPORATE LIABILITY

Some general principles of EC/EU law are of particular importance to corporate criminal liability. These principles result from the Treaties, the case law of the Community courts and acts adopted under the third pillar of the EU. We do not analyse here the fundamental freedoms applicable to

74 M PIETH, above at fn 66, 179.
75 C WELLS, above at fn 72, 151.
76 G FERGUSSON, *Corruption and corporate criminal liability*, Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions, Vancouver, British Columbia [4-5 February 1998] 14, available at: <www.icclr.law.ubc.ca/Publications/Reports/FergusonG.PDF>.
77 B FISSE and J BRAITHWAITE, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993) 47.
78 Australian Criminal Code Act 1995, Part 2.5. sections 12(2) and fol.
79 New Article 102 of the Swiss Criminal Code.

criminal procedures and sentences such as the *nullum crimen, nulla poena sine lege* principle or *ne bis in idem*. Such guarantees currently result from the ECHR, which has to be observed in practice by the EU institutions and the Member States. The human rights dimension to EC/EU integration will reach a new level of development with the Lisbon Treaty however, since the latter makes the *Charter of Fundamental Freedoms* a binding instrument. This issue is examined in the fourth section of this chapter.

a. Subsidiarity

The principle of subsidiarity is enshrined in Article 5 TEU. According to this principle, decisions are taken as closely as possible to the citizen and constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level. The Community does not act (except in areas falling within its exclusive competence) unless such action is more effective than a national, regional or local one. Subsidiarity is close to the principle of proportionality, following which any action by the EC should not go beyond what is necessary to achieve the objectives of the Treaty. This holds true for any action that would intend to bring about the criminal law regimes of the Member States regarding corporate liability. New mechanisms are introduced in primary law by the Lisbon Treaty in order to check the compliance of envisaged EU legislation with the subsidiarity requirement, mainly through the scrutiny of national parliaments. We come back to this in the last section.

b. The acceptance of a national system of corporate criminal liability

A second issue relates to *indirect negative harmonisation*: can EC law implicitly prevent Member States from sanctioning Community rules - or even national rules - by means of corporate criminal liability? In *Amsterdam Bulb*, the ECJ made clear that the responsibility to choose appropriate sanctions against individuals who do not observe Community legal provisions is left, to a large extent, to the Member States.[80] The latter are therefore free to opt for criminal sanctions for the punishment of individuals who fail to observe Community rules, as they are deemed appropriate. In the aftermath of this Case, the ECJ added some

80 ECJ, case C-50/76, *Amsterdam Bulb BV* [1977] ECR 137 at paras 31 and 32.

requirements surrounding this freedom. They were summarized in the famous *Greek Maize* judgment, where the Court held that:

> 'infringements of Community law [must be] penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.'[81]

In the context of the protection of the Community's financial interests, the ECJ decided, in *Nunes and de Matos*, that the Member States were also entitled to sanction conduct that infringes EC law through criminal means and this even where the Community legislation only provides for civil sanctions.[82]

As a result, nothing seems to prevent a Member State from enforcing Community law by means of corporate criminal liability. However, the sanctioning system must respect the three abovementioned criteria, namely: effectiveness, proportionality and dissuasiveness. The ECJ is competent to control compliance with those requirements, especially that of proportionality.[83] As all EC measures pursue different objectives, a case-by-case analysis will be necessary in order to assess whether a Member State went too far when framing a system to sanction Community rules through criminal law.

The freedom of the Member States is also limited by the 'equivalence' principle. As a consequence, in our opinion, a Member State is compelled to sanction EC law through corporate criminal liability if comparable infringements under national law follow such a sanctioning regime. It may prove difficult to argue that civil or administrative sanctions are 'analogous, both procedural and substantive', to criminal penalties.

It was not until the *Hansen & Søn* judgment in 1990 that the ECJ had to deal - for the first time - with the question of whether a Member State was in breach of its Community obligations by allowing criminal sanctions to

81 ECJ, case C-68/88, *Commission v. Greece* [1989] ECR 2965 para 24. See also ECJ, case C-14/83, *Von Colson and Kamann* [1984] ECR 1891, especially at 23.

82 ECJ, case C-186/98, *Nunes and de Matos* [1999] ECR I-4883 at para 14.

83 See in particular for a case where the ECJ concluded that a national sanctioning regime disturbs the functioning of the internal market beyond what the effectivity of Community law necessitated, ECJ, case C-77/97, *Österreichische Unilever* [1999] ECR I-431 at paras 35 and 36.

be decided against a corporate body.[84] The Case concerned Regulation 543/69 on the driving periods for the drivers of certain vehicles. This regulation did not specify that the rules it contained had to receive criminal-law protection in national legal orders. Hansen & Søn was a Danish firm active in the road transport sector. In March 1984, during of a check carried out by the Dutch police, it was established that a driver employed by the company Hansen & Søn had driven for longer than was allowed under the abovementioned Regulation. The company, criminally prosecuted before Danish Courts, argued that Denmark had infringed EC law by instituting corporate criminal sanctions not foreseen by the Regulation. The reference to the ECJ for a preliminary ruling concerned, in particular, the fact that Danish law did not (explicitly) subordinate criminal punishment of a corporate body to any intentional act or negligence ('no fault'). Did Denmark go beyond the discretion left to the Member States by Regulation 543/69 by introducing such a far-reaching criminal liability system?

The ECJ first asserted that the purpose of Regulation 543/69 was not to limit the employer's liability for his employees' failures but rather to impose specific and distinct obligations on the employer himself. Nothing in the Regulation would therefore prevent a Member State from holding an employer strictly liable in criminal law.[85] The Court subsequently acknowledged that different sanctioning regimes in the Member States, to some extent, might distort competition within the common market. This was, nonetheless, a consequence of the fact that the regulation in question did not fully harmonise the sanctioning regime, which amounted to a political choice.[86] Moreover, the ECJ held that the economic consequences of an infringement to the regulation, *'vary not only according to the system of criminal liability introduced by the Member State in question but also according to the level of the fine imposed and the degree of effectiveness of the checks carried out'*. As a consequence, the introduction of a system of strict criminal liability was proportionate and did not in itself involve a distortion of the conditions of competition.[87]

It can be concluded from this judgment that the Court is not easily ready to interpret the Internal Market and competition rules in such a way that they

84 ECJ, case C-326/88, *Hansen & Søn* [1990] ECR t-2911.

85 Para 12.

86 Para 14. As far as criminal law is concerned, this choice is however not purely political since the ECJ does not recognize the EC any general competence in this respect. See below at 3.1.

87 Para 15.

could ban the introduction of corporate criminal liability in domestic legal systems. This was particularly understandable at a time when - as rightly pointed out by the Danish government in the course of the proceedings - policy in the field of criminal law had not been the subject of deep international cooperation, except sporadically.[88]

In our opinion, this does not mean that the Member States have a totally free hand in this respect, especially in the light of the development of an area of justice, freedom and security.[89] In Hansen & Søn, the sanction did not fundamentally differ in nature from administrative fines applied in other Member States for comparable breaches of the regulation on driving periods by employers.[90] The assessment might be different in a case where the criminal sanctions towards corporate bodies include measures differing in an essential way from administrative fines, such as the exclusion from entitlement to public benefits or aid, disqualification from the practice of commercial activities or a judicial winding-up order. In such cases, the door remains open for a judicial assessment of the proportionality of the criminal sanctions applicable to legal persons. In the case of a preliminary ruling, this balance will in the end be made by the national judge but fully in line with the ECJ's reasoning. In the absence of any harmonisation in this respect, it does not seem unthinkable that the ECJ might declare that such sanctions, if they are much higher than what seems necessary to punish the offence adequately, distort competition beyond what is necessary for ensuring compliance with EC rules.[91] Such a ruling would, arguably,

88 See ECR [1990] at I-2915.

89 It is not uncommon for the ECJ to reverse former case-law in the light of the subsequent creation of an area of freedom, security and justice and the development thereof through secondary law. Illustrative of this is the evolution of the case-law regarding identity checks at the internal frontiers of the Community. Compare e.g. ECJ, case C-378/97, *Wijsenbeek* [1999] ECR I-6207 and ECJ, case C-215/03, *Oulane* [2005] ECR I-1215.

90 Noticeably, Advocate General VAN GERVEN proposed a comparative study, between various Member States, of the economic consequences of the infringements of the regulation at stake by economic operators. See ECR [1990] at I-2925, quoting A BUTT PHILIP, 'The application of the EEC regulations on drivers' hours and tachographs in the road transport sector', in: H SIEDENTOPF and J ZILLER (eds), *Making European Policies Work* (London/Brussels, Sage/Bruylant, 1988) 88. This part of the conclusions undoubtedly influenced the Court's reasoning when the latter decided that the Danish strict criminal liability regime did not amount as such to a distortion of the conditions of competition.

91 In *Donckerwolcke*, the ECJ already decided that a national criminal-law provision affected the internal market in a disproportionate manner, thereby constituting a measure having an effect equivalent to a quantitative restriction. See ECJ, case C-41/76, *Donckewolcke and Schou* [1976] ECR 1921, esp. paras 36 to 38. In *Watson and*

require a prior comparative analysis of domestic sanctioning systems in the EU.

As already mentioned, the general principles of EC law and, more especially, fundamental rights, ought also be observed by the domestic criminal law systems in situations governed by EC law. Proportionality undoubtedly belongs to these general principles. The EU Charter of Fundamental Rights of 12 December 2007 codifies the proportionality principle in the field of criminal law by specifying that the severity of penalties must never be disproportionate to the criminal offence.[92] Another fundamental principle relates to the constitutional traditions of the Member States, which should always be observed when sanctioning Community rules. It is striking that Advocate General Walter Van Gerven scrutinised the Danish strict criminal liability system in the light of the constitutional traditions of the Member States in his conclusions in the Case of *Hansen & Søn*. He concluded that it was *'impossible [...] to deduce from the constitutional tradition common to the Member States the existence of an absolute prohibition on the introduction in certain specified circumstances of a system of strict criminal liability.'*[93] As confirmed by later developments under the third pillar, the same conclusion undoubtedly holds true with regard to corporate criminal liability as it relies on a more subjective conception of corporate culpability.

c. The acceptance of a national refusal of corporate criminal liability

The third principle relates to *indirect positive harmonisation*: can EC law require – even only implicitly – the introduction of a domestic regime of corporate criminal liability? In other words, is EC law capable of an

Belman, a case regarding the free movement of workers, the ECJ excluded deportation as a potential sanction in case of breach of purely administrative requirements. Such a sanction was deemed to be disproportionate. See ECJ, case C-118/75, *Watson and Belman* [1976] ECR 1185 at paras 19 and 20. Admittedly, this line of reasoning concerned cases where the domestic measure at stake did not intend to give effect to EC law. These measures were therefore only put into balance with the rules of the EC Treaty regarding the internal market, and not with any EC secondary law provisions whose compliance should be specifically ensured. As a result and unlike in *Hansen & Søn*, such derogations to EC primary law had to be strictly interpreted. Be it as it may, the dismissal of disproportionate domestic criminal sanctions pronounced in those cases is interesting for the present discussion.

92 Article 49, 3° CFR.

93 Opinion delivered on 5 December 1989 at para 13.

indirect effect of positive harmonisation on domestic legal systems with regard to corporate criminal liability? As mentioned above, EC law may do so when infringements of national law of a similar nature and importance are sanctioned by means of corporate criminal liability (the principle of equivalence). This was the case in the United Kingdom for example with the adoption of the *Trade Marks Act 1994*.[94] But what if the equivalence principle should be inoperative?

Whereas EU framework decisions provide minimal harmonisation with regard to corporate liability, currently they do not compel Member States to introduce criminal penalties to sanction the offences. Administrative or civil sanctions may well be appropriate provided they are effective, proportionate and dissuasive.

Coming back to the EC, in the order in *Zwartveld and Others*, the ECJ interpreted the *Greek Maize* judgment broadly. While repeating that Member States enjoy a wide freedom to take all measures necessary to guarantee the application and effectiveness of Community law, the Court admitted that this could require criminal punishment in certain specific circumstances.[95] In other words, and irrespective of the equivalence principle, one could argue that a criminal penalty is required to ensure full compliance with an EC measure in a limited number of cases. Only a criminal penalty would fulfil the traditional requirements of effectiveness and dissuasiveness.[96]

However, to date the ECJ has never decided that compliance with these requirements necessarily implies the possibility to sanction a legal person under criminal law.

This was made clear in *Vandevenne*, a Case, like *Hansen & Søn*, concerning road transport.[97] Mr. Vandevenne was employed as a truck driver for Wilms Transport, a Belgian road transport company. Vandevenne's driving time was controlled by the Dutch police, which

94 Example cited by A PINTO and M EVANS, above at fn 17, 5.

95 ECJ, case C-2/88, *J.J. Zwartveld and others* [1990] ECR I-3365 at para 17.

96 See for an example the comments of the Commission to its own Proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology, COM(2006) 829 final, 8 December 2006 at 9 and 10. See for an opposite example, where the act itself specifies that it does not call for criminal sanctions, the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on electronic commerce, *OJ* L 178/1, preamble (54).

97 ECJ, case C-7/90, *Vandevenne and others* [1991] ECR I-4371.

concluded that he had infringed Regulation 3820/85 on the harmonisation of certain social legislation relating to road transport. A Belgian prosecutor started proceedings against Vandevenne before Belgian courts. In parallel, the undertaking Wilms Transport was summoned as the party liable under civil law. Article 15 of Regulation 3820/85 provided that: (1) the transport undertaking must organize drivers' work in such a way that drivers are able to comply with its own provisions and of the relevant provisions of Regulation (EEC) 3821/85, and; (2) the undertaking is compelled to make periodic checks to ensure that the provisions of these two Regulations have been complied with. If breaches were to be found among drivers, the undertaking was to take appropriate steps to prevent their repetition.

At that time, Belgium had not yet introduced a system of corporate criminal liability. The Belgian judge therefore referred the case to the ECJ in order to determine, in particular, whether Regulation 9820/85 made it compulsory for the Belgian authorities to punish the employer - in this case a legal person - in criminal law. The ECJ first repeated its usual formula, according to which Member States retain discretion as to the choice of penalties when a Community act does not provide any specific sanction in the case of a breach. As decided in the *Greek Maize* judgment, the domestic provisions must nonetheless ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.[98] Hence the ECJ concludes:

> '[N]either Article 5 of the Treaty [now Art. 10 EC] nor Article 17(1) of Regulation No 3820/85 requires a Member State to introduce into its national law a specific system of criminal liability, such as the criminal liability of legal persons, in order to ensure compliance with the obligations imposed by Article 15 of the regulation.'[99]

Admittedly, this case-law only concerned a specific regulation in the road transport sector. However, since the Regulation at stake in this case imposed specific obligations on a collective entity - the 'transport undertaking' - it seems difficult in practice to envisage a case where the reasoning of the Court could be reversed. It seems highly unlikely, in the absence of any harmonisation of the sanctions, that the Court would decide

98 Para 11.

99 Para 12.

that an EC secondary-law measure requires corporate criminal liability in order to be effective.

Again, the ECJ was probably influenced in *Vandevenne* by the disparities between Member States with regard to the sanctioning of legal persons,[100] which were even more marked at that time than is currently the case. The ECJ had already decided in *Casati* that the EC does not enjoy any direct competence in the field of criminal law.[101] In this context and several years before the institutionalisation of the third pillar in Maastricht, it might have appeared too far reaching and even *ultra vires*, for the ECJ to play a practorian harmonisation role in favour of a controversial concept sueh as corporate criminal liability.

d. The reliance on national dcfinitions of 'legal persons'

A fourth element is that the interpretation of the coneept 'legal person' is systematically defined in EC/EU law by reference to national law. Domestic definitions of legal persons may vary considerably from one Member State to another, for example regarding the acquisition of legal personality. This is in sharp contrast with the concept of 'undertaking' in EC competition, which is defined in Community law and is clearly distinct from a 'legal person' according to the case law of the ECJ.[102] In addition, the existing framework decisions adopted under the realm of the third pillar do not aim to harmonise sanctions towards 'public' legal persons. States, other public bodies acting in the exercise of State authority and international organisations, even if they are considered legal persons under domestic law, are not the subject of the framework decisions insofar as concerns minimum harmonisation rules regarding corporate liability.

100 J WOUTERS and P WYTINCK, 'Het begrip "onderneming" en de strafrechtclijke aansprakelijkheid van rechtspcrsonen in het Europees Gemeenschapsrecht. Noot onder HvJ, Vandevenne', *Tijdschrift voor Rechtspersoon en Vennootschap* [1992] 167.

101 ECJ, case C-203/80, *Casati* [1981] ECR 2595 para 27.

102 See for illustrations of the difference made by the ECJ between both concepts, ECJ, case C-6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215 at para 4; ECJ, case C-15/74, *Centrafarm* [1974] ECR 1147 at para 41.

e. The identification model and the parallel prosecution of natural persons

The existing framework decisions, which will be examined in more detail in the third part of this chapter, may undoubtedly be linked to the above mentioned *identification theory*. They indeed clearly recall the *alter ego* doctrine by requiring each Member State to ensure that legal persons can incur responsibility for related offences when they are committed for their benefit by any person, acting either individually or as part of an organ of the legal person, holding a leading position within the legal person on basis of a power of representation, an authority to take deeisions on behalf of the legal person, or an authority to exercise eontrol over it. A second provision usually requires that a legal person be held equally liable where the lack of supervision or control by such a high ranking natural person has rendered the offence possible for the benefit of that legal person, by another person under its authority. Corporate liability may not exclude parallel prosecutions against natural persons.[103]

These culpability criteria come close to those surrounding corporate criminal liability in the United States.[104] This model unquestionably influenced the recent innovations introduced in some EU Member States where corporate criminal liability did not exist a few years ago. Often such innovations go beyond the limited range of offenees covered by the EU framework decisions, the latter therefore entailing a kind of spill over effect.[105]

It is remarkable that the harmonisation efforts undertaken at EU level, although very recent, do not take full account of recurring critieism of the identification theory. The EU legal framework focuses on upper management and currently, largely ignores organisational liability. Moreover, the drafters of the *corpus iuris* in the seeond half of the nineties, probably being conseious of the deficieneies of the identification theory, had proposed to extend the cirele of those natural persons whose behaviour might extend the legal person's liability to its *middle management*. This concept referred to persons who assume *de facto* rather than *de jure*

103 See e.g. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, *OJ* L 69/97, 16 March 2005, Article 8.

104 A NIETO MARTIN, 'Américanisation ou européanisation du droit pénal économique', *Rev. Sc. Crim.* [2006] 783.

105 See e.g. thc case of Romania, where corporate criminal liability concerns all forms of criminality.

responsibilities within the company.[106] This proposal has not been followed by the EU institutions.

Be this as it may, it should be kept in mind that framework decisions only define some minimum requirements in order to achieve their objectives. As a consequenee, they do not prevent Member States from applying other liability standards provided the latter do not restrict corporate liability below the threshold established by the harmonising measures. Vicarious liability for example remains eonceivable sinee it goes beyond the classical identifieation approaeh defended by the framework decisions. On the contrary, the harmonisation undertaken at the EU level might be problematic for Member States wanting to replace *alter ego* attribution mechanisms by a holistie system, unless the latter would only be introdueed to complement to the former.

3. INTERACTIONS BETWEEN THE FIRST AND THIRD PILLARS

3.1. ENVIRONMENTAL PROTECTION AS A TEST CASE

Arguably, the abovementioned disparities between domestie regimes of eorporate liability among the Member States are at first glance more striking in the EU context. The ereation of an area of justice, freedom and security has become a core and horizontal objective of the Union,[107] especially through the insertion in the Treaties of a specifie title on Police and Judicial Cooperation in Criminal Matters (third pillar). This objective is reinforced with the Lisbon Treaty of December 2007, which extends the Community method to the area of criminal justice and police cooperation.[108] One could logically expect the European institutions in the first place, to taekle the issue of the fight against corporate crime under the third pillar. This seems all the more likely given that the ereation of an area of justice, freedom and security does not only encompass natural persons but also coneerns legal entities.[109]

106 K TIEDEMANN, above at fn 6, 272. See Article 14 of the *corpus iuris*.

107 Article 2 fourth indent EU.

108 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ* C 306/1, 17 December 2007, esp. new Article 3 TEU and 82 to 86 TFEU. See below, 4.

109 See in this sense the conclusions delivered by Advocate General Kokott on 8 March 2007 in case C-467/05, *Dell'Orto*, at para 54.

This is not to say, however, that the EC institutions were eompletely unaware of the importance of the growing discussion regarding the fight against corporate crimc, even before the creation of the EU. Controversial issues may indeed arisc as to the extent to which the classieal Community path (first pillar) has a role to play in the field of criminal law. It is commonly accepted that the choice between the first and the third pillar is not purely cosmetic. Both paths still present important differences not only with regard to thc decision-making process but also concerning ECJ competences, the nature of the acts concerned and relations with domestic law.[110] For examplc, a Member State that does not (correctly) implement a directive on visa, asylum or immigration risks being prosecuted by the Commission before the ECJ under an infringement procedure.[111] This is due to the fact that those policies, although belonging to justice and home affairs, were incorporated in the Community pillar at Amsterdam. By contrast, no infringement procedurc is available in the field of police and judicial cooperation in criminal matters.

Early in the Nineteen-eighties, the Commission had defendcd the idea that the EC enjoyed limited compctences in the field of criminal law. The Commission argued that such a competencc might exist in cxceptional circumstances, namely when the effectiveness of an EC mcasure could not be guaranteed other than by imposing criminal sanctions through secondary law.[112] The Membcr States and the European institutions had shown growing concern about the increasing scale and frequency of the cross-border effects of environmental crime. As a result, environmental protection soon appeared a true test case in ordcr to assess the competences of the EC in the field of criminal law (a.).[113] This is of particular importance for our discussion since the measures recently challengcd in this field beforc the ECJ contained harmonisation measures regarding the liability of corporatc bodies. According to the most recent case law of the ECJ however, this compctence remains limited (b.).

110 See in particular V HATZOPOULOS, 'With or without you...judging politically in the field of Area of Freedom, Security and Justice', 38 *E.L. Rev.* [2008] 44-65.

111 For an illustration of an infringement procedure with regard to title IV EC, see ECJ, case C-34/07, *Commission v. Luxembourg* [2007] nyr.

112 D FLORE, 'Un droit pénal européen: hasard ou nécessité', in: D FLORE, S BOSLY, H BRULIN, S CLAISSE, S DE BIOLLEY, M-H DESCAMPS, J-S JAMART and M RAVENSTEIN, *Actualités de droit pénal européen* (Bruges, La Charte, 2003) 6.

113 On the influence of environmental protection on the multiplication of corporate criminal liability mechanisms in Europe, see C RINGELMANN, 'European Trends in Environmental Criminal Legislation', *Eur. Journ. of Crime, Cr. L. and Crim. Just.* [1997] 403-404.

a. The claim for Community competence in the field of environmental protection

As a result of several environmental disasters due to human activity, in 2000 Denmark proposed the adoption of a framework decision on combating serious environmental crime.[114] This initiative was remarkable in that, as far as we know, was the first envisaged instrument explicitly requiring the introduction by the Member States of corporate criminal sanctions for a given category of offence.[115] This proposal aimed to encourage a genuine criminal-law area with regard to serious environmental offences.[116] The Danish proposal nonetheless did not reach the required unanimity in the Council.

The Commission defended a different point of view in a subsequent proposal. Whereas the proposal more or less pursued the same goals as the Danish one, the Commission envisaged a directive, the counterpart to a framework decision in EC law.[117] The Commission based this proposal on Article 175 (1) EC, devoted to EC environment policy. Even though some of its versions seem to indicate the contrary,[118] this proposal represents a step back in comparison with the Danish initiative since it does not specifically compel Member States to sanction legal entities by criminal means.[119] Notwithstanding this, the Commission's proposal intended a minimum harmonisation of the principles governing corporate liability and the applicable type of sanctions. The Commission justified this approach by arguing that legal persons were the first beneficiaries of the offences in question and should therefore be sanctioned as a priority. Interestingly, the Commission expressed its favour for criminal law apparatus in the preamble of the proposed Directive. The Commission highlighted that sanctioning legal persons in criminal law holds a particular social symbolism that is not comparable to civil or administrative sanctions. The

114 See Initiative of the Kingdom of Denmark with a view to adopting a Council framework decision on combating serious environmental crime, *OJ* C 39/4, 11 February 2000.

115 Article 2, 1° *b*.

116 See in particular Article 2, 2°.

117 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, *OJ* C 180E/238, 26 June 2001.

118 See e.g. the French and Dutch versions.

119 Article 4. The Commission eventually took into account the ongoing disparities between domestic systems in this respect. See C WIJNANTS, 'Corporate environmental liability within the European Union', in: S TULLY (ed.), above at fn 35, 334-348.

Commission added that judicial cooperation could be more efficient in the field of criminal law and that criminal proceedings, unlike administrative ones, were applied systematically by independent and impartial judicial authorities.

The Council in the end adopted a framework decision (EU instrument), to a large extent taking up the content of the Commission's proposal.[120] This framework decision was to be read in conjunction with a Community directive, adopted under the legal basis Article 175 defining the general framework of environmental liability in Community law.[121] This second Community instrument, as usual, did not aim to harmonise criminal laws or facilitate cooperation between the competent judicial authorities.

The Commission started proceedings against this framework decision before the ECJ. The Commission mainly argued that the Council, by adopting the Framework Decision under the third pillar (EU law), had infringed Article 47 EU in conjunction with Articles 174 to 176 EC. The scope and aim of the contested act would mainly concern the protection of the environment and, as a consequence, squarely fall within the scope of Community competence.[122] The ECJ followed the Commission's reasoning and declared the framework decision void.[123] The Court settled the ongoing controversy between the Commission and the Council by concluding that:

> 'the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, [may take]

120 Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, *OJ* L 29/55, 5 February 2003. See in particular Articles 6 and 7, devoted to corporate liability.

121 Directive 2004/35/CE of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJ* L 143/6, 30 April 2004.

122 Conversely, the question whether the ECJ is competent to annul an EC harmonisation measure in a field (mainly) falling under third pillar competence remains disputed. See R VAN OOIK and T VANDAMME, *Soc. Eco. Wet.* [2006] 80.

123 ECJ, case C-176/03, *Commission v. Council* [2005] ECR I-7879. See on this judgment C TOBLER, 43 *C.M.L. Rev.* [2006] 855-884; D PICHOUSTRE, 'La compétence pénale de la Communauté', *Journ. Trib. Dr. Eur.* [2006] 10-16; R VAN OOIK and T VANDAMME, above at fn 122, 78-85; D SYMON, 11 *Europe* [2005] 11-13; L RINUY, *Rev. Aff. Eur.* [2005] 689-699; K INGLIS, 'Creeping criminal competences in Environmental law? The implications of the ECJ Judgment in case C-176/03 for the criminal law enforcement of European Community law', 1 *JECL* [2007] 9-25.

> measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'[124]

The Court's findings however left at least two issues unanswered. Firstly, it remained unelear whether the EC criminal law competence could be exercised in fields other than environmental protection. Secondly, the meaning and scope of the expression *'measures which relate to the criminal law of the Member States'* was uncertain. It is interesting to note that Advoeate General Colomer, in his conclusions, shared the view of the Commission that *'[t]he requirement to prosecute not only natural persons but also legal persons goes to the design of the basic model of response to offences to the environment, which is a Community task'*.[125] In other words, the EC would have competence, in exceptional eircumstances, to decide that Member States shall hold criminally liable not only natural but also legal persons. According to the Advoeate General, this is part of the definition of a criminal law response to infringements of EC rules.[126] By contrast, the national legal systems should be only competent to *'particularise that legislation, clarify it and instil it with the vigour necessary for it to serve its stated purpose'*.[127] As a consequence, the Community would not be competent to specify the type of sanctions applicable to legal persons, and even less to lay down sanctioning scales. These conclusions were nevertheless not part of the judgment and a clear position of the ECJ was therefore expected on these points.

The Commission interpreted the Court's reasoning extremely widely in its Communication of November 2005.[128] According to the Commission, the EC, as a result of the ECJ ruling, would be competent to adopt measures relating to the criminal law of the Memher States whenever necessary for the effective implementation of Community law. This would apply not only to environmental protection but to all common policies and to the four

124 See para 48.

125 See para 95 of thc conclusions delivcred on 26 May 2005.

126 See para 90 of the conclusions.

127 *Ibid.*

128 Communication from the Commission to the European Parliament and the Council of 23 November 2005 on the implications of the Court's Judgment of 13 September 2005 (Case C-176/03 Commission v. Council), COM(2005) 283 final. See in particular F COMTE, 'Communication de la Commission au Parlement européen et au Conseil sur les conéquences de l'arrêt de la Cour du 13-9-2005 relatif aux "sanctions pénales"', *Rev. Dr. U.E.* [2006] 131-147.

freedoms provided the various measures are consistent with cach other.[129] Moreover, the Community competence would go beyond the sole criminal character of the response to breaches of EC law and include the type and levcl of the penalties. Only police and judicial cooperation in criminal matters would remain a matter for the third pillar.[130]

Despite a partial disagreement of the European Parliament with thcsc standpoints,[131] the Commission introduced several new proposals to protcct Community rules or values through criminal law provisions and partially harmonising the national levels of sanctions. The proposed instrumcnts not only concern environmental protection.[132] They also touch upon intcllectual property rights,[133] the hiring of illegal staying third country nationals[134] or the fight against illegal fishing.[135] By contrast with the first Danish initiative for a framework decision on combating serious environmental crime, the proposed instruments systematically left the Member States frec to choose the type of sanctions applicable to lcgal entities, whcthcr criminal or not.

b. Current limits to Community competence

Following the judgment of the Court in this first *Criminal Penalties* Casc, the Commission started proceedings against the framework decision

129 See paras 6 and 12 of the communication.

130 This definition would entail measures on the mutual recognition of judicial decisions, measures based on the principle of availability, and measures on the harmonisation of criminal law in connection with the creation of the area of freedom, security and justice not linked to thc implemcntation of Community policies or fundamental freedoms. See para t1 of the communication.

131 European Parliamcnt Rcsolution of 14 Junc 2006 on the conscquenees of the judgment of the Court of 13 September 2005 (C-176/03 Commission v. Council), 2006/2007 (INI).

132 See Proposal of 9 February 2007 for a directive of the Europcan Parliamcnt and the Council on the protection of the environment through criminal law, COM(2007) 51 final, esp. Articlcs 6 and 7.

133 See Amended Proposal of 26 April 2006 for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM(2006) 168 final, esp. Articles 5 and 6.

134 Proposal of 16 May 2007 for a directive of the European Parliament and of the Council providing for sanctions against employers of illegal staying third-country nationals, COM(2007) 249 final, esp. Articles 12 and 13.

135 Proposal of 17 October 2007 for a Council regulation establishing a Community system to prevent, deter and eliminate illcgal, unreported and unregulated fishing, COM(2007) 602 final, esp. Articles 43 and 46.

regarding ship-source pollution.[136] This instrument, like the Framework Decision on the protection of the environment through criminal law, intended to harmonise the types of sanction applicable to natural persons or legal entities committing one of the enumerated offences.[137] It was however more concerned about transport policy.[138]

The Court, in a judgment of 23 October 2007, annulled the Framework Decision on ship-source pollution for the same reasons as it annulled the Framework Decision 2003/80 on the protection of the environment through criminal law. By using the third pillar to minimally harmonise domestic criminal laws, the Council would have infringed the principle enshrined in Article 47 EU (integrity of the *acquis communautaire*) since the EC enjoys limited competence in the field of criminal law.

The interest of this new judgment however lies in the boundaries laid down by the ECJ with regard to this Community competence. The *Ship-source Pollution* Case[139] clarifies to some extent the Court's findings in the first criminal penalties Case.

Firstly, according to the Court's reasoning, some of the harmonisation provisions of the Framework Decision on ship-source pollution - including Article 5 on corporate criminal liability - should have been adopted by the EC acting on grounds of Article 80 (2) EC (transport policy). As a consequence, the Court does not seem to limit the scope of the EC competence in criminal matters to the sole environmental policy measures adopted on grounds of Articles 174 to 176 EC. Admittedly however, the ECJ still focuses the attention on the environmental aspects of the Case. It remains unclear whether this case law covers Community measures that do

136 Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, *OJ* L 255/164, 30 September 2005. This Framework Decision completed the Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, *OJ* L 255/11, 30 September 2005.

137 See Articles 5 and 6.

138 The Court indeed concludes that certain provisions of the framework decision should have been adopted on grounds of Article 80, 2° EC. See para 69.

139 ECJ, case C-440/05, *Commission v. Council* [2007] ECR I-9097. See on this judgment A MONPION, 'Arrêt CJCE Commission contre Conseil du 23 octobre 2007: les limites de la compétence pénale de la Communauté', *Rev. Marché Com.* [2008] 130-135; A DAWES and O LINKSEY, 'The Ever-Longer Arm of EC Law: Extension of Community Competence into the Field of Criminal Law', 45 *C.M.L. Rev.* [2008] 131-158.

not concern environmental protection but which would arguably deserve a criminal law protection in order to be effective.[140]

Secondly, the Court precised to some extent the distribution of powers between the EC and the EU in the field of criminal law. According to the Court, the EC may be competent, under the same conditions as those described in the first criminal penalties Case, to *'require Member States to apply criminal penalties to certain forms of conduct.'*[141] The authors share the opinion that this covers not only a decision that a sanction has to be criminal in nature but also any ancillary rules with regard to complicity[142] and arguably also, participation.

As far as corporate liability is concerned, this should also include the culpability criteria and the rules governing parallel prosecutions against natural and legal persons.[143] This is no trivial aspect: the EC could require the introduction in all Member States of corporate criminal liability by qualified majority voting with regard to certain Community policies, even though their scope remains unclear. Should the qualified majority not be reached, then it could not be excluded that at least eight Member States propose to enter in an enhanced cooperation in this respect.[144]

By the same token, the new judgment drastically limits the scope of the EC competence in criminal matters. The *Ship-source Pollution* Case is by far more rigid than the Commission's Communication intended. According to the ECJ, it is not for the EC to determine the *'type and level of the applicable criminal penalties, nor to organize judicial cooperation between the Member States'*.[145] This seems to echo the conclusions of Advocate General Colomer in the first environmental Case, where he had stated that:

140 See however the conclusions of Advocate General Mazák delivered on 28 June 2007 at 97 to 102. In his conclusions, the AG argues that it is not really feasible to contend that the harmonisation power should be limited to the area of environment in the light of the principle of effectiveness of Community law.

141 See para 69.

142 See Article 3 of the Framework Decision 2005/667/JHA.

143 The Court explicitly confirms that a provision such as Article 5 of the Framework Decision under discussion, dealing with such questions, could be adopted on grounds of Article 80, 2° EC.

144 This could also be possible for third pillar measures. One could for example conceive EU enhanced cooperation in the field of dual incrimination.

145 See para 70.

> '(n)o party seems to be in a better position than the national legislature which, since it has first-hand knowledge of the legal and sociological particularities of its arrangements for coexistence, must opt, within the framework previously defined by the Community, for the response most apt to uphold Community law.'[146]

One may however regret that the ECJ has left unanswered the fundamental question of the precise seope of measures that can bc adopted under the third pillar.[147] As rightly pointed out by Advocate General Colomer in his conclusions in the first criminal penalties Case, the powers enjoyed by the Council acting on grounds of Article 29 EU read in conjunction with Article 31*e* EU, are far from clear cut and have been widely interpreted by the Council.[148] Anyway, the various proposals recently made by the Commission and referred to above are most probably not viable any more when considering thc dividing line established by this seeond criminal penalties Case.

Interestingly enough, thc Court extended this important limit to the EC competence to Article 6 of the Framework Decision on ship-source pollution, dealing with sanctions applicable to legal persons.[149] Quite surprisingly at first sight, the ECJ asserts that such sanetions are criminal and that the EC would therefore have no eompetence to harmonise neither their type nor their level.[150] As usual however, the Framework Decision did not specifically foresec the introduction of corporate *criminal* liability in the domestic legal orders of the Member States.[151] This part of the Court's reasoning might be explained by the fact that Artiele 6, although not necessarily requiring criminal sanctions, in practice harmonises the type and level of criminal sanctions applicablc to legal persons in those Member States applying corporate criminal liability. This harmonisation went much further than certain EC legal instruments which only require the Member States to hold legal persons liable by means of effective, proportionate and dissuasive sanctions.[152]

146 See para 85 of the conclusions delivered on 26 May 2005.
147 Sce for comparable criticism A DAWES and O LINKSEY, above at fn 139, 143.
148 Above at fn 125, footnote 15 of the conclusions.
149 Whereas Article 5 deals with corporate liability as such, Article 6 concerns the typc of sanctions applicable to them where they are held liable.
150 See para 71.
151 See in particular Article 6, 1° of the Framework Decision 2005/667/JHA.
152 See e.g. Directive 2005/60/CE of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, *OJ* L 309/15, 25 November 2005, Article 39.

By contrast, the Court's findings in the *Ship-source Pollution* Case, in our opinion, do not prejudice the possibility for the Community to harmonise the type and level of eivil or administrative sanctions as regards either natural or legal persons, provided sueh convergence is indispensablc. The case law on sanctions sketched above seems to confirm this conclusion.[153] Admittedly, many of those cases dealt with measures that deliberately lack any harmonisation of sanctions. On the contrary the main issue was the extent to which Member States could comply with the usual requirements of effeetive, proportional and dissuasive sanctions analogous to those applicable to infringements of national law of a similar nature and importance. The Court in these cases however, systematieally reminded as of the potential for harmonisation in this respect.[154] Recent judicial developments reinforce the view that the main limit to the harmonisation of civil or administrative sanctions in the first pillar is that of proportionality.

3.2. FIRST PILLAR INITIATIVES

It is apparent from the above that the EC does not enjoy any general competence in the field of eriminal law, even though it is commonly accepted that national eriminal laws may be influenced or even affected by Community rules.[155] A true 'opérationnalité intégrée'[156] or 'supranationalité répressive' in the field of criminal law implying a genuine Community criminal legal order, simply appears unthinkable under the eurrent institutional structure. This explains for example the absence so far of a European Prosecutor to prosecute persons suspected of a limited number of particularly serious infringements of Community rules. Despite the fact that EC law has resulted in some cascs in the adoption of criminal law provisions in the Member States, the Community laeks a eriminal court of its own that would be solely eompetent in this respect. In other words, the ECJ is still subordinatc to the domestic criminal eourts, even though the latter may or are even obliged in certain circumstances to refer to the ECJ for a preliminary ruling.

153 See above at 2.3.b and c.
154 See e.g. para 23 of the *Greek Maize* judgment, above at fn 81.
155 See e.g. the case *Casati*, above at fn 101.
156 D FLORE, above at fn 112, 15.

Against this background, some EC policies or initiatives, other than those concerning environmental protection, are worth mentioning. Whereas not aimed as such at criminalising the misconduct of legal persons, they are indisputably related to the present discussion.

a. Protection of the financial interests of the Community and of the *euro*

Corporate criminal liability of legal persons first came under discussion in the EC realm when the latter aimed at protecting its financial interests against bribery, money laundering and, more generally, fraud potentially affecting the Community budget. Fraud and economic and financial crime have caused considerable harm to the EC, especially when committed by large companies. Article 280 (ex-Art. 209A) EC provides that the Council may *'adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States'*. These rules however should not concern the application of national criminal law or the national administration of justice.[157]

Whereas the Member States agreed that criminal measures to combat such forms of criminality were needed, there was still no consensus about the EC competence to adopt them. The Convention on the protection of the European Communities' financial interests was therefore adopted under the third pillar.[158] This Convention however did not intend to harmonise sanctions applicable to legal persons. As a result of criticism regarding this issue, in particular the very vocally objection by the framers of the *corpus iuris*, this Convention was completed by a Second Protocol, adopted on the same grounds[159] and following a recommendation of the Financial Action Task Force (FATF).[160]

Corporate bodies should be held liable, either in criminal, civil or administrative law, when committing offences causing harm to the EC's

157 Article 280, 4° EC.

158 *OJ* C, 316/49, 27 November 1995.

159 Above at fn 36.

160 See Recommendation 2, available at: <www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html#r2>.

financial interests.[161] Even though its implementation raised difficulties or was eventually delayed in certain Member States,[162] this Protocol unquestionably played a fundamental role in reducing differences between European regimes of corporate liability.[163] According to Article 3:

> '1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on;
> - a power of representation of the legal person, or;
> - an authority to take decisions on behalf of the legal person, or;
> - an authority to exercise control within the legal person,
> as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.
> 2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.
> 3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.'

161 Article 3.

162 Luxembourg and Austria have had some difficulties to accept that the corporation as such might be hold liable. See Report from the Commission of 25 October 2004, Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and protocols, COM(2004) 709 final at 6.

163 See Explanatory Report on the Second Protocol to the Convention on the protection of the European Communities' financial interests, *OJ* C 91/8, 31 March 1999. See also Report from the Commission to the European Parliament and the Council of 6 July 2007, Protection of the financial interests of the Communities. Fight against fraud. Annual report 2006, COM(2007) 390 final, esp. at 23 and 47 of the annex and the 2005 Report of 12 July 2006, COM(2006) 378 final at 14 and 15.

Article 4 further provides:

> '1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:
> (a) exclusion from entitlement to public benefits or aid;
> (b) temporary or permanent disqualification from the practice of commercial activities;
> (c) placing under judicial supervision;
> (d) a judicial winding-up order.
> 2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (2) is punishable by effective, proportionate and dissuasive sanctions or measures.'

Those formulae would considerably influence any subsequent EC/EU legal instruments dealing with corporate liability. We come back to this when examining the third-pillar initiatives.

It should further be noted that this legal framework was accompanied by the creation of the OLAF. This office received the power to *'carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions'*.[164] These investigative powers may be used in respect of legal persons, including where criminal charges are pressed under domestic law.

In 2001, the Commission proposed that the Convention and its Protocols were given more teeth by means of a Directive containing provisions on criminal law and corporate liability.[165] The proposal however never succeeded because the Council could not accept any EC competence in the field of criminal law.

[164] Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), *OJ* L 136/20, 31 May 1999, Article 2, 1°.

[165] Proposal for a directive of the European Parliament and of the Council of 23 May 2001 on the criminal-law protection of the Community's financial interests, COM(2001) 272 final.

The legal instruments protecting the *euro* against counterfeiting followed a similar fate. The common currency is a typical European 'common good'. Nevertheless, the Council systematically refused to recognize any EC criminal law competence. A Framework Decision was therefore adopted to combat counterfeiting more efficiently by means of criminal law measures, especially with regard to legal entities.[166] Again, this Framework Decision does not require as such corporate criminal liability. According to a Report from the Commission of September 2007, the provisions of the Framework Decision on corporate liability have nonetheless not yet been introduced in all of new Member States that joined the EU in 2004 and 2007.[167]

b. 'Material' criminal law competences

Rather than examining how far EC law may influence internal criminal laws, one might wonder whether the EC itself does not exercise criminal functions, in particular towards legal persons. As the EC does not formally enjoy any autonomous criminal law competence, such a question necessarily refers to the material - rather than formal - definition of criminal law.

This informal conception was defended by the ECtHR, especially when interpreting Articles 6 and 7 of the European Convention on Human Rights (ECHR) and the requirements of a fair trial and *nulla poena sine lege*.[168] Confronted with the risk that some sanctions and the behaviours they intend to prevent, might be considered non-criminal by the States parties to the proceedings, the ECtHR developed the theory of *autonomous concepts*.[169] The ECtHR applies ECHR criminal standards to civil, administrative[170] or disciplinary[171] proceedings provided they have certain

[166] Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *OJ* L 140/1, 14 June 2000, esp. Articles 8 and 9.

[167] See Third Report from the Commission based on Article 11 of the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, COM(2007) 524 final, esp. annex at table 6.

[168] Article 6 ECHR contains guarantees that only benefit to persons charged with « criminal offences », such as the presumption of innocence (para 2), the right to be promptly informed of the nature and cause of the accusation (para 3 *a*) or to have adequate time and facilities for the preparation of the defence (para 3 *b*).

[169] G LETSAS, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 2 *Eur. Journ. Int. L.* [2004] 281 and 282.

[170] See e.g. ECtHR, *Öztürk v. Germany*, n. 8544/79, 21 February 1984, esp. para 53.

characteristics. This case law focuses mainly on the very nature of the offence and on the nature and the degree of severity of the penalty[172] rather than on domestic dividing lines between criminal, administrative or civil sanctions.

There are several fields of activity where the EC appears to enjoy such 'material' criminal competence in respect of legal persons.

A first illustration of this concerns the sanctioning powers of the Commission in cases of breaches of EC competition rules. Admittedly, Regulation 1/2003 expressly excludes that the fines imposed by the Commission on companies found in breach with Articles 81 and 82 EC be qualified as 'criminal' in nature. According to the Regulation, they are strictly administrative.[173] Fines adopted on this ground may reach ten percent of the turnover of the company in the preceding business year. This eventually led to record fines of several hundred millions of *euros* against *Microsoft* and arguably much higher amounts than national criminal judges could impose.

These sanctions are qualified as 'criminal' in the sense of the ECHR on a case-by-case analysis, taking into account the nature of the offence and the nature and severity of the sanction. The punitive nature of the sanctioning measures and the fact that the latter are not necessarily adapted to the harm caused by the economic operator to the market but rather to the gravity of the infringement, are essential factors in this respect.[174] Although it is not evident at first sight, the case-law of the ECJ and the CFI nowadays tends to confirm this point of view. Avoiding the thorny question of qualification as such,[175] Community courts usually examine the legality of the sanctions decided by the Commission in the field of competition law in the light of

171 See e.g. ECtHR, *Engel and others v. the Netherlands*, n. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, esp. paras 81 and fol.; ECtHR, *Demicoli v. Malta*, n. 13057/87, 27 August 1991, esp. paras 33 and 34.

172 See e.g. ECtHR, *Weber v. Switzerland*, n. 11034/84, 22 May 1990, paras 32 to 34; ECtHR, *Campbell and Fell v. the United Kingdom*, n. 7819/77 and 7878/77, 28 June 1984, paras 71 and 72.

173 Article 23, 5° of the Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* L 1/1, 4 January 2003.

174 See in the same vein R LEGROS, 'Note sous CJCE, 32/78, 12 juillet 1979', *Cah. Dr. Eur.* [1980] 220. See also A MULDER, 'Geldboete, een eigen middel van de Europese Gemeenschappen', *Soc. Econ. Wet.* [1989] 465.

175 See in particular CFI, case T-83/91, *Tetra Pak v. Commission* [1994] ECR II-755, esp. at para 235.

the conventional guarantees applicable to criminal offences and procedures.[176] More generally, the ECJ does not hesitate to extend procedural guarantees traditionally linked to criminal offences or charges to EC 'administrative' sanctions.[177]

The European Central Bank (ECB) also has the power to impose fines and periodic penalty payments on natural and legal persons in cases where the latter fail to fulfil an obligation arising from ECB regulations or decisions.[178] Whereas this power is administrative in nature, it should not be excluded that some sanctions decided on those grounds may be qualified as 'criminal' due to their severity or in the light of the culpability criteria taken into account for their adoption.[179]

In the field of the common agricultural policy (CAP), from time to time the Council adopts autonomous sanctions.[180] However, the responsibility for the prosecution of the offences and the imposition of fines on natural or legal persons rests with the Member States. Be it as it may, the ECJ does not qualify as criminal, sanctions - quite common in CAP - that are mainly aimed to compensate the damages caused by the offender or to replace him in the situation before the offence. This is for example the case of a temporary exclusion from the benefit of a scheme of aid.[181]

176 See e.g. on the requirement that penalties should have a proper legal basis (Article 7 ECHR) ECJ, case C-117/83, *Könecke* [1984] ECR 3291; CFI, case T-279/02, *Degussa v. Commission* [2006] ECR II-897. On the non-retroactivity of criminal law (Article 7 ECHR), see e.g. CFI, case T-23/99, *Løgstør Rør A/S v. Commission* [2002] ECR II-1705; CFI, case T-220/00, *Cheil Jedang Corporation v. Commission* [2003] ECR II-2473; CFI, case T-64/02, *Heubach v. Commission* [2005] ECR II-5137.

177 S MANACORDA, 'Le droit pénal et l'Union européenne : esquisse d'un système', *Rev. Sc. Crim.* [2000] 113.

178 See in particular Council Regulation (EC) 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, *OJ* L 318/4, 27 November 1998.

179 Some of the criteria described in 2, 3° of Regulation 2532/98 are comparable to those applicable in criminal proceedings (e.g. the degree of openness of the undertaking, repetition, the economic size of the undertaking or prior sanctions).

180 See e.g. Council Regulation (EEC) 1722/93 of 30 June 1993 laying down detailed rules for the application of Council Regulations 1766/92 and 1418/76 concerning production refunds in the cereals and rice sectors respectively, *OJ* L 159/112, 1 July 1993, Article 10, 7°.

181 ECJ, case C-137/85, *Maïzena* [1987] ECR 4587 at paras 13 and 14, and ECJ, case C-240/90, *Germany v. Commission* [1992] ECR I-5383 at paras 25 and 26. See also more recently ECJ, case C-210/00, *Käserei Champignon Hofmeister* [2002] ECR I-6453 at paras 35 to 44.

The fight against terrorism provides another - perhaps clearer - example of Community informal criminal sanctions adopted against corporate bodies. The famous Council Regulation 881/2002,[182] adopted a few months after the terrorist attacks of September 2001 and implementing Common Position 2002/402/CFSP in EC law, is a good illustration thereof. This Regulation, which is still in force, was adopted on the basis of Articles 60, 301 and 308 of the EC Treaty.[183] It aims to freeze the assets not only of natural but also of legal persons that, according to the UN Security Council Sanctions Committee, are linked to terrorist groups or activities. The list of those legal persons, annexed to the Regulation, is revised regularly. Again, the sanction is implemented by the EC institutions themselves, like in some competition cases. The severity of the sanctions could be decisive in order to qualify them (at least partially) as criminal, in the light of the criteria laid down by the ECtHR.[184]

The CFI widely denied any effective judicial remedy to those persons explicitly targeted by the decisions of the UN Security Council Sanctions Committee and who had started proceedings against the Community measures implementing them.[185] The very low protection of human rights - especially the right to a fair trial - has been strongly denounced by many academics. In his recent conclusions in the appeal on the CFI's judgment in *Kadi*, Advocate General Maduro did not tackle as such the tricky question of the qualification of the sanctions adopted on grounds of Regulation 881/2002.[186] It is however remarkable that he encourages the ECJ in such

182 Council Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *OJ* L 139/9, 29 May 2002.

183 New Article 75 TFEU explicitly confirms the competence of the Union to adopt measures such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

184 See for a defence of this standpoint the Report of the Committee on Legal Affairs and Human Rights of the CoE Parliamentary Assembly (rapp. Dick Marty), United Nations Security Council and European Union blacklists, paras 29 to 34, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11454.pdf>.

185 CFI, case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533 and CFI, case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649. Compare in particular with CFI, case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665.

186 See ECJ, case C-402/05 P, still pending, opinion of 16 January 2008.

cases to apply higher standards of human rights than the CFI did, especially in the light of the potentially devastating effects a freezing of assets may entail.[187] He finally concludes that the judgment of the CFI should be set aside by the ECJ.

In our view, these conclusions should be transposed to legal persons. Admittedly, the ECJ is ready to accept that EC counter-terrorism measures have substantial negative consequences for some legal persons, in the light of the political importance of the objective they pursue.[188] It remains that the ECJ protects the right of those entities to a fair trial and an effective remedy. In *PKK and KNK* for example, where these organisations had suffered from asset-freezing measures, the ECJ made clear that legal persons must also be granted appropriate access to justice in order to defend their own interests.[189]

Nevertheless, the ECJ did not go so far as to open up a praetorian access for individuals, especially legal persons, seeking redress for damages as a result of EU third pillar measures aimed at fighting terrorism. The ECJ, for example, dismissed the claim for damages introduced by *Segi* and *Gestoras*, two Basque organisations, due to their inclusion on lists of persons, groups and entities allegedly linked to terrorist activities. These lists were indeed annexed to Common Positions, resorting to the EU. Considering that Article 35 EU, unlike Articles 235 and 288 (2) EC, does not foresee any action for damages under the third pillar, the ECJ concluded that it was the role of an ICG, not of judges, to introduce such a fundamental change to the system of judicial protection.[190] In the future, the Lisbon Treaty should allow natural or legal persons to start proceedings before the ECJ in order to directly review the legality of CFSP measures entailing such restrictive consequences for them.[191]

187 See in particular para 47.

188 ECJ, case C-84/95, *Bosphorus* [1996] ECR I-3953 at 23.

189 ECJ, case C-229/05 P, *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdiston National Congress (KNK) v. Council* [2007] ECR I-439.

190 ECJ, case C-355/04 P, *Segi e.a. v. Council* [2007] ECR I-1657 at paras 44 to 63 and ECJ, case C-354/04 P, *Gestoras Pro Amnistia e.a. v. Council* [2007] ECR I-1579 at paras 44 to 63. See also CFI, case T-299/04, *Selmani v. Council and Commission* [2005] ECR II-20 that applies a similar reasoning to the access of individuals to the action for annulment against common positions.

191 See new Article 275 al.2 TFEU.

These examples tend to illustratc how, despite the faet that it does not enjoy any formal criminal law competence, the EC is not profoundly opposed to sanctioning a company or legal person with a certain degree of severity when it does not comply with legal requirements, rather than, say, its managers or high-level cmployces. In certain specific cases, the sanctioning powers of the EC would therefore arguably amount to 'criminal charges' for the purposes of the ECHR.

3.3. THIRD PILLAR INITIATIVES

a. From mutual trust to mutual recognition

Procedural and substantial aspects of eriminal law vary greatly between the different EU Mcmbcr Statcs. It clearly appears from Articles 29, 31*e* and 34 (2)*b* EU that the Member States only allow third pillar framework decisions to introduce minimum standards as to thc dcfinition of offences and sanctions.[192] Despite the differences and the protcctcd national sovereignty, there is enough common ground and mutual trust to rccognise foreign decisions. The principlc of mutual recognition of judicial decisions helps to overcome the difficultics resulting from the procedural diversity and improves thc judicial cooperation between States, without harmonising national criminal laws. However, mutual recognition of a forcign criminal law decision eventually also must mean enforcing it. Too little attention is paid to thc differences with regard to the liability of legal persons in this respect.

Some forms of inutual rccognition are already embodied in the instruments of judicial cooperation adopted, before the Maastricht Treaty, in various forums, and subsequently under the European framework. In the 1970 Council of Europe Convention on the International Validity of Criminal Judgments, the common desire of European States to make a joint effort to fight crime at an international level, has found tangible expression. The fundamental concept behind the Convention is the assimilation of a foreign judgmcnt to a judgment emanating from thc courts of another Contracting State. This concept is applicd in three different areas, namely, the enforcement of the sentence, the *ne bis in idem* effect and more generally, when taking foreign judicial decisions into considcration.

[192] G VERMEULEN, 'Vijftien jaar uniestrafrecht: verwezenlijkingen en perspectieven', in: J MEEUWEN and G STRAETEMANS, *Politionele en Justitiële strafrechtelijke samenwerking in de Europese Unie* (Intersentia, Antwerpen, 2007) 84.

An important provision of this Convention is Article 4, according to which:

> 'The sanction shall not be enforced by another Contracting State unless under its law the aet for which the sanction was imposed would be an offence if committed on its territory and the *person* on whom the sanction was imposed *liable to punishment* if he had committed the act there.'[193]

Article 4 deals only with one aspect of *dual incrimination*. The criminal character of the act or behaviour in question is indeed not to be examined in the requcsting State. The existence of a valid criminal judgment presupposes liability in that State. Only the criminal character in the requested State is open to examination. The condition is fulfilled if the act which gave rise to the judgment in a particular State would have been punishable if committed in the State requested to enforce the judgment and if the person who performed the act eould have been sanctioned under the criminal law of the rcquested State. Paragraph 1 covers this notion, since it refcrs expressly to the criminal character of the particular act, viewed as a complex combination of objective and subjective elements, as well as to the punishability of the perpetrator. The explanatory report accompanying the Convention further stipulates that, in order to clarify the notion of dual liability *in concreto,* account must be taken of the relations between the offender and the injured party, grounds justifying an act or serving as an excuse for it and objective eonsiderations making an act punishable.[194]

The Convention makes no explicit reference to the liability of legal pcrsons. Nevertheless, one could interpret Articlc 4(1) as providing ground for their exclusion when the sanction is imposed on a legal person and whcre the requested State does not recognise the principle of corporate criminal liability.

In contrast, the 1991 Convention concluded between the EU Member States on the enforcement of forcign criminal sentcnces deals with the problem of criminal sanctions adopted against legal persons and contains a provision

[193] Council of Europe, European Convention on the International Validity of Criminal Judgments, The Hague, 28.V.1970 (ETS n°70), see <http://conventions.coe.int/Treaty/en/Treaties/Html/070.htm>. [emphasis added].

[194] See Explanatory Report on the European Convention on the International Validity of Criminal Judgments, <http://conventions.coe.int/Treaty/EN/Reports/HTML/070.htm>.

on the difficulties a State might face when requested to enforce a criminal law judgment regarding a legal person.[195]

According to Article 4 ('Enforcement of a sentence involving a pecuniary penalty or sanction'):

> 'The transfer of enforcement of a sentence involving a pecuniary penalty or sanction may be requested where:
>
> (a) the sentenced person is a natural person who is permanently resident in the territory of the administering State or has realizable property or income in its territory; or
> (b) the sentenced person is a *legal person* having its seat in the territory of the administering State or having realizable property or funds in its territory [emphasis added].'

Article 9(2) further provides that:

> 'The administering State which cannot comply with a request for enforcement on account of the fact that it is related to a legal person, may, by virtue of bilateral agreements, indicate its willingness to recover, in accordance with its provisions on civil procedure in enforcement matters, the amount of the pecuniary penalty or sanction imposed by the sentencing State.'

As for the European Union Third Pillar, the issue of mutual recognition was raised at the Cardiff European Council in 1998 and further discussed at the Tampere European Council in 1999, which concluded that this principle should become the cornerstone of judicial cooperation in both criminal and civil matters within the EU.[196] Designed to strengthen the cooperation between Member States, the principle of mutual recognition presupposes a far-reaching mutual trust that is grounded in the commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law. The ambitious 2001 Programme of Measures[197] maps out different areas in which the EU Member States

[195] Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences, Brussels, 13 November 1991, <www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/EN/EJN319.pdf>.

[196] G VERMEULEN, 'Vijftien jaar uniestrafrecht: verwezenlijkingen en perspectieven', above at fn 192, 82.

[197] Programme of measures to implement the principle of mutual recognition of decisions in criminal Matters (2001/C12/01), *OJ* C12/10, 15 January 2001.

should concentrate their efforts in order to achieve mutual recognition of criminal decisions in the European Union gradually.[198] We will discuss several priorities put forward in the Programme of Measures in order to analyse the extent to which the differences in recognition and application of corporate criminal liability between the Member States have been taken into account.

b. Mutual recognition of financial penalties and confiscation orders

Measure 18 of the Programme of Measures urges Member States to prepare an instrument enabling the State of residence to levy fines imposed by final decision on a natural or legal person by another Member State. Explicit reference is made to the differences between EU Member States as it stipulates that *'the proceedings will take into account the differences between EU Member States on the issue of the liability of legal persons'*.

The 2001 proposal for a Council framework decision on the application of the principle of mutual recognition to financial penalties was one of the first initiatives acting upon the provisions in the Programme of Measures.[199] The purpose of the proposed framework decision was to close one of the loopholes in the area of justice, freedom and security, by ensuring that financial penalties imposed in one Member State will be enforced in the Member State where the person concerned resides, has property or income.

Article 6 of the proposal makes the enforcement subject to the law of the Executing State, but requires enforcement of penalties against legal persons *'even when the Executing State does not recognize the principle of criminal liability of legal persons'*.[200] This provision did not anticipate any

[198] See G VERMEULEN, 'Mutual recognition, harmonization and fundamental (procedural) rights protection', in: *Fundamental Rights and the EU's Third Pillar* (London, Justice, 2007).

[199] Proposal from the French Republic, the Kingdom of Sweden and the United Kingdom for the adoption by the Council of a draft Framework Decision on the application of the principle of mutual recognition to financial penalties (10710/01), available at <www.register.consilium.europa.eu/pdf/en/01/st10/10710en1.pdf>.

[200] Explanatory note on the Initiative from the French Republic, the Kingdom of Sweden and the United Kingdom for the adoption by the Council of a draft Framework Decision on the application of the principle of mutual recognition to financial penalties (10710/01), available at <www.register.consilium.europa.eu/pdf/en/01/st10/10710-a1en1.pdf>.

alternative or exclusion ground for those Member States not recognizing the principle of corporate criminal liability, confronting them with a *fait accompli*.

The Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, finally adopted on 24 February 2005,[201] introduces a remedy for that shortcoming. Whereas it leaves unaffected the important principle contained in Article 6 of the proposal, the Framework Decision foresees an 'optional' transitional period of five years during which a Member State can limit the enforcement of a foreign decision sentencing a legal person to those offences for which a European instrument provides for the application of the principle of corporate liability.[202]

Those provisions are to be found in Articles 9(3) and 20(2)*b* of the Framework Decision:

> Article 9(3)
> 'A financial penalty imposed on a legal person shall be enforced even if the executing State does not recognize the principle of criminal liability of legal persons.'
>
> Article 20(2)b
> 'Each Member State may for a period of up to five years from the date of entry into force of this Framework Decision limit its application with regard to legal persons, decisions related to conduct for which a European instrument provides for the application of the principle of liability of legal persons.'

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders provides a similar solution.[203] According to Article 12(3), *'(a) confiscation order issued against a legal person shall be executed even if the executing State does not recognize the principle of criminal liability of legal persons'*. Unlike Article 9(3) of the Framework Decision on financial penalties, and quite astonishingly, this provision is however not subordinated to any transitional period.

201 *OJ* L 76/16, 22 March 2005.
202 See below, 3.3.*e*.
203 *OJ* L 328/59, 24 November 2006.

c. Mutual assistance in criminal matters

Another legal instrument where mutual trust between the Member States is of capital importance is the 2000 Convention on Mutual Assistance in Criminal Matters, established by the Council in accordance with Article 34 EU.[204] This Convention, which entered into force on 23 August 2005, stipulates that:

> 'Mutual assistance shall [...] be afforded in connection with criminal proceedings [...] which relate to offences or infringements for which a legal person may be held liable in the requesting Member State.'[205]

Even though not as explicit as the Framework Decisions on mutual recognition, this wording means that in practice, the competent authorities of the requested State cannot invoke the fact that their legal system does not recognize corporate criminal liability as a ground for refusing mutual assistance in a case where a legal person could be held liable in criminal law in the requesting State. This is a manifestation of the move by the Convention from the *locus regit actum* principle towards the *forum regit actum*: in principle, the request for mutual assistance should be deemed compatible with the legal system of the requested State.[206] The implications of this rule are quite far reaching. Without prejudice to the general principles facilitating mutual assistance referred to in the Convention, it means that all fields of cooperation targeted by this instrument are potentially applicable to criminal proceedings brought against legal persons in the requesting Member State: the placing of articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners (Art. 8); the temporary transferring of persons held in custody for purpose of investigation in the requesting Member State (Art. 9); the hearing of witnesses or experts by videoconference (Art. 10) or by telephone conference (Art. 11); the launching of controlled deliveries (Art. 12) or covert investigations (Art. 14) and the interception of telecommunications (Art. 18). The same applies to the function of a joint investigation team (JIT) even though the actual establishment of a JIT is subordinate to a mutual agreement following a request of one of the

204 *OJ* C 197/3, 12 July 2000. The Convention on extradition is out of purpose when legal persons are at stake.
205 Article 3(2).
206 G VERMEULEN, 'EU Conventions Enhancing and Updating Traditional Mechanisms for Judicial Cooperation in Criminal Matters', 77 *R.I.D.P.* [2006] 82-83.

Member States (Art. 13(1)). As the setting up of a JIT is not compulsory, the requested state can refuse it for whatever reason, including the lack of corporate criminal liability in its own legal system.

d. *Ne bis in idem*

Reeognition of a dccision also means that States other than that where the sanction was decided, must take the decision into account. Aecording to the *ne bis in idem* principle, a person cannot be prosecuted and/or condemned twice for the same deed. This principle is covered by the Convention between the Member States of the European Communities on Double Jeopardy signed in the framework of European political cooperation in Brussels on 25 May 1987. The Convention of the Council of Europe on the Transfer of Proccedings in Criminal Matters of 15 May 1972 and the Convention implementing the Schengen Agreement (CISA) of 14 June 1985, signed on 19 June 1990, also contain *ne bis in idem* rules.[207] A protocol to the Trcaty of Aınsterdam incorporates the developments brought about by the Schengen Agreement into the EU framework.

According to Article 54 CISA:

> 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

As argued above, the application of the *ne bis in idem* prineiple in cases of parallel prosecution of natural and legal persons remains unresolved. Does the personal conviction of a company manager or executive in a country not recognizing the corporate criminal liability for a *corporate crime*, exclude future prosecution of the company for the same deed before the courts of a country accepting the parallel eonviction prineiple for both the individual and the company? And, *vice versa*, does a conviction of a company cxclude future individual prosecution of its manager or exeeutive in another country?

207 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the Freneh Republic on the gradual abolition of checks at their common borders, *OJ* L239/19, 22 September 2000.

The criminal proceedings against *Hüseyin Gözütok* and *Klaus Brügge*, that eventually led to preliminary proceedings before the ECJ, provided no answer to these questions[208] nor did the later case law of the ECJ.

The purpose of the 2005 Green Paper on Confliets of Jurisdiction and the Prineiple of *ne bis in idem* in Criminal Proceedings[209] was to launeh a wide ranging consultation on issues of conflicts of jurisdietion in criminal matters, including the principle of *ne bis in idem*. The Green Paper identifies problems that may arise in this respect and suggests possible solutions. Unfortunately, this doeument, which lacks binding character, does not address the issue of tbe influence of possible parallel prosecutions of natural and legal persons for the application of the *ne bis in idem* principle. This eventually maintains the lack of legal eertainty.

e. Substantive eriminal law

Several framework decisions have been adopted under the third pillar and they eomprise some provisions harmonising corporate liability and applicable sanctions. Apart from the aforementioned Framework Decisions aiming at protecting the *euro* and the environment through criminal law measures, these instruments especially concern the fraud and counterfeiting of non-cash means of payment,[210] the fight against terrorism,[211] trafficking in human beings,[212] the facilitation of unauthorised entry, transit and residenee within the EU,[213] eorruption in the private sector,[214] the sexual

208 ECJ, joint cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge* [2003] ECR I-1345, on the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed on 19 June 1990 at Schengen (Luxembourg) (above at fn 207).

209 COM (2005) 696 final.

210 Council Framework Decision 2001/413/JHA of 28 May 2001, *OJ* L 149/1, 2 June 2001, Articles 7 and 8.

211 Council Framework Decision 2002/475/JHA of 13 June 2002, *OJ* L 164/3, 22 June 2002, Articles 7 and 8.

212 Council Framework Decision 2002/629/JHA of 19 July 2002, *OJ* L 203/1, 1st August 2002, Articles 4 and 5.

213 Council Framework Decision 2002/946/JHA of 28 November 2002, *OJ* L 328/1, 5 December 2002, Articles 2 and 3.

214 Council Framework Decision 2003/568/JHA of 22 July 2003, *OJ* L 192/54, 31 July 2003, Articles 5 and 6.

exploitation of children and child pornography,[215] illicit drug trafficking,[216] and attacks against information systems.[217]

These framework decisions are all built up in a fixed pattern. The definition of a legal person is based on the definition introduced by Article 1c of the 1997 Second Protocol to the PIF Convention.[218] As above mentioned, '(l)egal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations. An identical definition can be found in the Council of Europe Convention on Corruption.[219]

Besides the *committing* of any of the listed offences for their own benefit by any person, acting either individually or as a member of an organ of the legal person in question, who has a leading position within the legal person, based on (i) a power of representation of the legal person, (ii) an authority to take decisions on behalf of the legal person or (iii) an authority to exercise control within the legal person, the involvement as *accessories* or *instigators*, is also punishable, as is the *attempt* to commit any of the listed offences. Moreover, each Member State takes the necessary measures to ensure that a legal person found liable is punished by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines. This formulation takes into account the differences in the recognition and application of corporate (criminal) liability in the Member States and leaves room for national interpretation and implementation.

The Framework Decisions indicate possible sanctions for legal persons. In general, four types of sanction are enumerated:

(a) exclusion from entitlement to public benefits or aid;
(b) temporary or permanent disqualification from the practice of commercial activities;
(c) placing under judicial supervision;

215 Council Framework Decision 2004/68/JHA of 22 December 2003, *OJ* L 13/44, 20 January 2004, Articles 6 and 7.

216 Council Framework Decision 2004/757/JHA of 25 October 2004, *OJ* L 335/8, 11 November 2004, Articles 6 and 7.

217 Council Framework Decision 2005/222/JHA of 24 February 2005, *OJ* L 69/67, 16 March 2005, Articles 8 and 9.

218 See above at fn 36. See esp. Joint Declaration on Article 13(2) - Commission Declaration on Article 7, *OJ* C 221/12-22, 19 September 1997.

219 See above at fn 36, Article 1 *d*.

(d) a judicial winding-up order.

In addition, some Framework Decisions include other possible sanctions for legal persons, such as:

(e) the temporary or permanent closure of establishments which have been used for committing the offence;[220]
(f) the confiscation of substances which are the object of offences referred to, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities;[221]
(g) the obligation to adopt specific measures in order to eliminate the consequences of the offence which led to the liability of the legal person.[222]

4. FUTURE DEVELOPMENTS

4.1. THE LISBON TREATY

According to its Article 6(3), the Lisbon Treaty, signed on 13 December 2007 and following the failure of the Constitutional Treaty, is intended to enter into force on 1 January 2009, namely six months before the European Parliament elections of June 2009. At the time of writing, however, important uncertainties are threatening the ratification process of the Lisbon Treaty following the negative referendum held in Ireland on 12 June 2008 and the refusal expressed by Polish President Lech Kaczynski to sign this treaty, despite its ratification by the Polish Parliament.

220 Council Framework Decision on combating terrorism, above at fn 211; Council Framework Decision on combating trafficking in human beings, above at fn 212; Council framework Decision on combating the sexual exploitation of children and child pornography, above at fn 215; Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, above at fn 216.

221 Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, above at fn 216.

222 Council Framework Decision on the protection of the environment through criminal law, above at fn 120; Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, above at fn 136.

The Treaty of Lishon amends the *Treaty on European Union* (TEU) and the *Treaty establishing the European Community* (TEC), which becomes the *Treaty on the Functioning of the European Union* (TFEU). If successfully ratified, the Treaty of Lisbon will be a decisive step forward in the institutional evolution of the European Union. Historically, it is at least as significant as the Treaty of Maastricht which introduced cooperation in police and judicial affairs as the third pillar of the EU. The Lisbon Treaty will bring important novelties with regard to the harmonisation of criminal laws and mutual recognition of judicial decisions.[223] These evolutions are supported by broader reforms, especially those regarding the decision-making process and the competences of the ECJ, the latter being fully extended to the area of justice, freedom and security. Eventually this could bring about a true distinction between the pre- and the post-Lisbon eras in the field of European criminal justice.

One of the most important novelties introduced by the Lisbon Treaty is the now binding Charter of Fundamental Rights. This Charter enjoys the same rank and legal status as the Treaties, although the latter do not expressly include the text of the Charter as such.[224] A special Protocol introduces derogations for the United Kingdom and Poland as to the justiciability of the Charter.[225] The introduction of the *nullum crimen, nulla poena sine lege* principle in the Charter does not imply as such a criminal-law competence of the Union.[226] Article 51 (2) of the Charter expressly provides that it leaves Union competences as set out by the Treaties unaffected. Admittedly however, the Charter is not a negligible complement for future development of the area of justice, freedom and security. The Charter reinforces the idea that the Union is built on common grounds with regard to fundamental rights and the Member States have therefore no more reasons to resist cooperation and judicial assistance in criminal matters.

4.2. POTENTIAL INFLUENCE ON CORPORATE CRIMINAL LIABILITY

According to the new Article 82 TFEU, minimum rules may be established by means of directives in criminal matters having a cross-border dimension. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and

223 See below, 4.2.

224 See new Article 6(1) TEU.

225 *OJ* C 306/156, 17 December 2007.

226 See *contra* M D'AMICO, 'La Constitution européenne et la protection pénale des intérêts financiers de l'Union', in: F RUGGIERI (dir.), above at fn 26, 10.

shall include the approximation of the laws and regulations of the Member States to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation. In criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

This provision however only reaches to four areas: (a) mutual admissibility of evidence between the Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) or any other specific aspects of criminal procedure identified by the Council, after obtaining the consent of the European Parliament.

More important is the new Article 83 TFEU. According to this provision, it will be possible to adopt directives to establish minimum rules concerning the definition of criminal offences and sanctions in certain areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.[227] Moreover, if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area that has been subject to harmonisation measures, directives may be used to establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.[228] Such directives are to be adopted by qualified majority voting at the Council. The use of a word like 'definition' is not anecdotal, even though the level of harmonisation must not exceed 'minimum rules'. It remains to be seen whether this new wording will allow practice to reach

227 New Article 83, 1° TFEU. These areas of crime are further enumerated by the Treaty: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

228 The requirement that such minimal rules be preceded by harmonising measures in the area concerned is, in our opinion, a new element that does not necessarily result from both ECJ judgments in the criminal penalties' cases. In other terms, current case-law does not prevent the EC from simultaneously adopting measures in a given area and, in the same act, foreseeing that infringements to these measures have to be sanctioned in criminal law. See *contra* R SICURELLA, 'Les obligations communautaires après l'arrêt Commission c. Conseil du 13 septembre 2005: vers une protection toujours moins « indirecte » des intérêts de l'Union européenne', in: L CAMALDO (dir.), above at fn 57, 54.

beyond current case law limits, according to which the EC competence in criminal penalties is limited to requiring a criminal response. Meanwhile, the Lisbon Treaty indisputably does not limit the scope of such harmonisation to environment policy. It potentially covers all Union policies provided that previously they have given rise to harmonisation measures and they are essential to ensure their effective implementation. This wording nonetheless leaves many questions unanswered that could be dealt with by the ECJ in the future.

Apart from transitional measures, at least three important safeguards are set up in order to counterbalance the harmonisation powers of the Union and the application of qualified majority voting.

Firstly, according to new Article 67 TFEU, any measure adopted in the area of justice, freedom and security has to respect the *'different legal systems and traditions'* of the Member States. Although it is doubtful whether this could serve as a reason in itself for annulment by the ECJ, whether harmonisation in the field of corporate criminal liability at European level would be in line with this general requirement remains a question.

Secondly, a member of the Council will be able to request that a draft directive establishing minimum rules concerning the definition of criminal offences, be referred to the European Council if it considers that this draft would affect fundamental aspects of its criminal justice system.[229] Admittedly, Member States like Sweden, Germany or Greece could be tempted to invoke this provision in the field of corporate criminal liability. If this were to be the case, the legislative procedure would be suspended. Within four months, the European Council, in case of a consensus, may lift the suspension of the ordinary legislative procedure. Should a disagreement persist within the same timeframe, then at least nine Member States could decide to establish enhanced cooperation on the basis of the draft directive concerned. An initiative for enhanced cooperation following such an enduring impasse in Council would not need any parliamentary authorisation, contrary to an ordinary initiative for enhanced cooperation which requires a two-thirds majority in the European Parliament. In practice, this could mean that the directive would be adopted by, say, twenty-four out of twenty-seven Member States, thereby creating new concentric circles of integration within the area of justice, freedom and security.

[229] See new Article 83, 3° TFEU.

Thirdly, the protection of subsidiarity is reinforced, especially through a new procedure before national parliaments during the decision-making process. The new Treaty also recognises that the Committee of the Regions has legal standing to bring an action before the ECJ against legislative acts that would infringe this principle.[230] Subsidiarity, arguably, can limit the harmonisation competence of the Union in the field of corporate criminal liability. It remains to be seen whether the Union, in the light of the subsidiarity principle, could introduce corporate criminal liability in specific areas to harmonise the procedural and material aspects of the criminal law systems of the Member States in this respect.

CONCLUSION

The above analysis indicates that a coordinated European policy regarding corporate criminal liability, although necessary to create the conditions for equal competitiveness between legal persons active in the EU, is barely identifiable nowadays and probably cannot be expected in the years to come. This is mainly due to the institutional struggle over the distribution of powers between the EC and the EU in the field of criminal law as well as the multi-faceted diversity among Member States concerning corporate criminal liability.

The various EU Framework Decisions and the consciousness expressed by the European Commission in its Green Paper to bring about domestic regimes and in turn, to enhance mutual trust, are encouraging signs. Strongly influenced by instruments adopted by other international organisations, these Framework Decisions specifically aim to combat serious trans-border crime. They point to the awareness of the European institutions that at least some forms of criminality are better fought at the level of the company or organisation than at individual level. Hopefully the recent judgments of the ECJ concerning criminal penalties will not cause too much delay in the adoption of new instruments to better coordinate efforts against serious forms of criminality involving legal persons, such as large-scale pollution or organised crime.[231] In this sense the introduction of qualified majority voting by the Lisbon Treaty could revolutionize the area of justice, freedom and security.

[230] See Protocol on the application of the principles of subsidiarity and proportionality, esp. Article 6, 7 and 8.

[231] See pending proposition of the Commission for a Council Framework Decision on the fight against organised crime, COM(2005) 6, 19 January 2005.

Admittedly against this background the harmonisation resulting from these Framework Decisions is low: Member States are not obliged as such to sanction corporate bodies under criminal law: the liability criteria are widely defined and the various types of individual sanctions mentioned are optional. It is doubtful that such harmonisation represents the maximum limit beyond which subsidiarity would be infringed. More ambitious instruments could take into account the problems encountered by the Member States in applying corporate criminality, if necessary by means of enhanced cooperation. For example some reflection could be launched at European level with regard to the establishment of clearer culpability criteria, the public and/or private legal persons or collective bodies that can be held criminally liable, parallel prosecutions between individuals and legal persons, and even the type and level of sanctions that could better be adapted to collective entities or the international aspects of corporate criminal liability.

In parallel, horizontal instruments such as the Framework Decisions on the mutual recognition of financial penalties and of confiscation orders, or the EU Convention on Mutual Assistance in criminal matters where the dual incrimination principle in corporate criminal liability has been cancelled, have essential practical effects. No doubt a clarification of the consequences of the *ne bis in idem* principle for parallel prosecutions against both natural and legal persons would be opportune. The introduction of a European criminal record should also be considered, including information concerning sentencing of legal persons or any other measures to further facilitate the execution of judgments or judicial decisions pronounced in another Member State. The Lisbon Treaty offers decision-makers new opportunities to develop this legal framework. Much will depend on the scope of the Union's competences to pursue further harmonisation in criminal matters and, most significantly, on the ability of the Member States to overcome their classical reserve of sovereignty for the sake of an ever stronger area of justice, freedom and security.